

OCT 10 1924

WM. H. STANSBURY

Supreme Court of the United States

OCTOBER TERM, 1924

No. ~~103~~ 14

WILLIAM T. PRICE AND ORA PRICE,

Plaintiffs in Error,

VS.

MAGNOLIA PETROLEUM COMPANY, A JOINT STOCK ASSOCIATION; JOHN SEALEY, E. R. BROWN, B. WAYERLY SMITH, E. E. PLUMLY, AND W. C. PROCTOR, TRUSTEES; STATE OF OKLAHOMA, EX REL. COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA, AND EX REL. S. P. FREELING, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Defendants in Error.

ORIGINAL BRIEF OF PLAINTIFFS IN ERROR AND RESPONSE TO MOTION TO DISMISS

J. F. SHARP,
C. B. STUART,
M. K. CRUCE,
W. C. STEVENS,
E. E. BLAKE,

Of Counsel.

SUBJECT INDEX

	Page
Statement of Case.....	1
Section 10 of Enabling Act.....	2
Constitution of Oklahoma, Art. XI, Sees. 1 and 4	4
Statute of Oklahoma, challenged as Uncon- stitutional	6
Statute of Oklahoma, Sales Act, abstracted	14
Segregation Resolution (Rec. 80).....	20
Statement of Specific Facts.....	22
Statement of Specific Facts under Statutes..	24
Questions Presented	27
Contentions of Parties.....	29
Assignment of Errors.....	33
Specific Answer to Motion to Dismiss.....	34
Introduction; historical review of Law of case	51
Argument	63
On forced sale, contention.....	87
On Fee Farm Rent.....	103
On Review of Movants Brief, Critical....	108
On "Known Mineral" Lands.....	122
On Effect of Changes in Lease Instrument	126
On Review of Opinion of Supreme Court of Oklahoma	130
On Injunction, as the remedy.....	145
Conclusion	149

CONSTITUTIONS AND STATUTES CITED

Constitution of United States, Art. I, Sec. 10.66,	147
Constitution of United States, Amendment	
XIV	13
Constitution of United States, Amendment	
V	13, 78
Constitution of Oklahoma, Art XI, Sec. 1	
.....4, 63, 83, 84, 109,	116
Constitution of Oklahoma, Art. XI, Sec. 4	
.....4, 16, 68, 84,	87
Statutes of United States:	
Enabling Act, Sec. 10, (34 Stat. L. 267)	
.....2, 16, 22, 34, 36, 63, 70, 71, 79, 84,	111
.....112, 120, 126,	146
Organic Act, Sec 18 (26 Stat. L. 81).....	20, 21
Act of Mex. 3rd, 1891, Sec. 36 (26 Stat. L.	
1043)	72, 130
Act May 4th, 1894, (28 Stat. L. 71)	
.....66, 72, 74, 83, 84, 86, 104,	130
Act June 6th, 1900, (31 Stat. L. 680).....	22
Act June 16, 1906, Enabling Act (34 Stat.	
L. 267)	1
Enabling Act, Sec. 8 (34 Stat. L. 267)	
.....63, 108, 124,	146
Act Sept. 6, 1916, Ch. 448, Par. 2 Jud. Code	
237	34
Statutes of Oklahoma:	
Appraisal Statute of "1908" (Appears as	
Apx. A)	24, 64
Segregation, or "deem" statute (Appears	
as Apx. B, also) ..	24, 37, 82, 99, 137, 146
Sales Statute of 1909 (Appears as Apx. C,	
also)	14, 25, 63, 68, 86, 87, 93, 112, 116
.....	124, 126, 137, 140
May 26, 1908, Ch. 49, Art. III (S. L.), Sec.	
21	93
Rules and Regulations for Leasing (Rec.	
134, R. 8).....	103, 104, 130, 135

ALPHABETICAL LIST OF CASES CITED IN BRIEF

<i>Ard v. Brandon</i> , 156 U. S. 537; 39 L. Ed. 524.	96
<i>Aherion v. Fowler</i> , 96 U. S. 513; 24 L. Ed. 732.	147
<i>Benson Min. Co. v. Alto Min. Co.</i> , 145 U. S. 428; 36 L. Ed. 762.	97
<i>Betts v. Commissioners</i> , 27 Okla. 64; 110 Pac. 76630, 66, 67, 69, 71, 100, 104, 127.	134
<i>Black v. Jackson</i> , 177 U. S. 349.	146
<i>Boehl v. Dilla</i> , 114 U. S. 57, 51; 29 L. Ed. 61, 63	82
<i>Bratten v. Cross</i> , 22 Kans. 674.	67
<i>Brent v. Bank of Wash.</i> , 35 U. S. 596.	98
<i>Brunner v. Hicks</i> , 230 Ill. 536.	136
<i>Burke v. So. Pac.</i> , 234 U. S. 699; 58 L. Ed. 152785, 98, 127.	133
<i>Burton v. Traver</i> , 130 U. S. 232; 32 L. Ed. 92019.	64
<i>Carter v. Sapulpa Ry. Co.</i> , 49 Okla. 471.	95
<i>City of Chicago ex rel. Miller</i> , 80 Ill. 384.	74
<i>Clark v. Frazier</i> , 177 Pac. 589, 74 Okla. (not published)66.	130
<i>Clement v. Warner</i> , 24 How. 394, 397; 14 L. Ed. 695, 696	82
<i>Cohens v. Virginia</i> , 6 Wheat. 264.	50
<i>Colorado Coal & Iron Co. v. United States</i> , 123 U. S. 307; 31 L. Ed. 182.85.	113
Constitution of Colorado, Art. IX, Sec. 9.	73
Constitution of Oklahoma, Art. II, Sec. 23.	78
Constitution of Oklahoma, Art. II, Sec. 24.	147
Constitution of Oklahoma, Art. XI, Sec. 14, 63, 83, 84, 109.	116
Constitution of Oklahoma, Art. XI, Sec. 44, 16, 63, 68, 84.	87
Constitution of United States, Amend. 5. 13, 19.	78
Cooley Constitutional Law, 328 Note p. 330.	82
<i>Corn Products Ref. Co. v. Eddy</i> , 249 U. S. 427; 63 L. Ed. 689.	46
<i>Crew-Lerick Co. v. Pa.</i> , 245 U. S. 292, 294, 62 L. Ed. 295-297.	46

<i>Dallas v. Club Land and Cattle Co.</i> , 95 Tex. 200; 66 S. W. 294.....	103, 140
<i>Darling v. Newport News</i> , 249 U. S. 549; 63 L. Ed. 759.....	39, 40
<i>Dartmouth College v. Woodward</i> , 4 Wheat 518; 4 L. Ed. 623.....	19, 75, 82
<i>Davis v. Wiebold</i> , 139 U. S. 507; 35 L. Ed. 238	69, 85, 98, 101
<i>Deffenback v. Hawke</i> , 115 U. S. 392; 29 L. Ed. 423	69, 85, 97, 98, 101, 123
<i>Del Monte v. Last Chance</i> , 171 U. S. 75; 43 L. Ed. 72.....	148
<i>De Peyster v. Michael</i> , 57 Am. Dec. 470.....	106
<i>Dorer v. Richards</i> , 151 U. S. 658; 38 L. Ed. 305	85
<i>Dunn v. Yakish</i> , 10 Okla. 388; 61 Pac. 926....	95
<i>Erhardt v. Boaro</i> , 113 U. S. 527.....	148
<i>Eldred v. Okmulgee</i> , 22 Okla. 742; 98 Pac. 929	76, 136
<i>Errien v. U. S.</i> , 251 U. S. 41; 64 L. Ed. 128	30, 67, 84, 142
<i>Ferris v. Frohman</i> , 223 U. S. 424; 56 L. Ed. 128	39
<i>Fletcher v. Peck</i> , 6 Cranch 87, 137.....	82
<i>Folk v. U. S.</i> , 233 U. S. 177; 147 C. C. A. 183....	98
<i>Fouts v. Fondrey</i> , 31 Okla. 221; 120 Pac. 960..	95
<i>Frisbe v. Whitney</i> , 9 Wall 187; 19 L. Ed. 668..	96
Gould on Waters, Sec. 291.....	77
<i>Greene v. Biddle</i> , 8 Wheat 1; 5 L. Ed. 54.....	82
<i>Green v. Robinson</i> , 210 S. W. 498 (Tex.)	84, 85, 102, 118, 123
<i>Gruner v. Hicks</i> , 230 Ill. 536; 82 N. E. 888....	77
<i>Guffey v. Smith</i> , 237 U. S. 101; 58 L. Ed. 856	27, 76, 78, 136, 145, 148
<i>Harden v. Shedd</i> , 190 U. S. 508; 47 L. Ed. 1156	39
<i>Haskell v. Hayden</i> , 23 Okla. 518; 126 Pac. 232	69, 100, 127, 134
<i>Haws v. Victoria Co.</i> , 160 U. S. 303.....	148
<i>Hoyt v. Firico</i> , 175 Pac. 517.....	76, 136
Ind. Div. 7006, 1901, Dept. of Int. Appd. Oct. 8, 1901	86

<i>Jernigan Trcas. v. Finley, Compt.</i> , 90 Tex. 206; 38 S. W. 24.....	74
<i>Kansas City So. v. Road Imp. Dist. No. 6</i> , 256 U. S. 658, 65 L. Ed. 1151.....	42
<i>Kenney v. Loyal Order of Moose</i> , 252 U. S. 411; 64 L. Ed. 638.....	41
<i>Knorr County v. Humolt</i> , 110 Mo. 67; 19 S. W. 628	74
<i>Lake Erie West R. Co. v. State Public Utilities Com.</i> , 249 U. S. 658; 65 L. Ed. 115.....	43
<i>Lake Superior Const. Co. v. Cunningham</i> , 155 U. S. 354; 39 L. Ed. 182.....	83
<i>Lane v. Hogland</i> , 244 U. S. 174.....	120
<i>Lynch v. U. S.</i> , 13 Okla. 142; 73 Pac. 1097.....	98
<i>Lytle v. Ark.</i> , 9 How. 315; 13 L. Ed. 153	96, 97, 98, 133
<i>Mackey Tel. v. Cable Co. v. Little Rock</i> , 250 U. S. 94; 63 L. Ed. 863.....	41
<i>Merchants National Bk. v. City of Richmond</i> , 256 U. S. 635; L. Ed. 1135.....	42
<i>Miller v. Cressman</i> , 140 Cal. 440; 73 Pac. 1083..	148
<i>Minn v. Batchelder</i> , 68 U. S. 551; 17 L. Ed. 551	84
<i>Moss v. Dorman</i> , 176 U. S. 413; 44 L. Ed. 526..	82
<i>Mountain Timber Co. v. Wash.</i> , 243 U. S. 219; 61 L. Ed. 685, 696.....	46
<i>Myers v. Hettinger</i> , 94 Fed. 370.....	95
<i>Nelson v. Northern Pac.</i> , 118 U. S. 107, 108; 47 L. Ed. 406.....	96
<i>New England Co. v. Congdon</i> , 171 U. S. 75; 43 L. Ed.....	148
<i>New Orleans & N. E. R. Co. v. Scarlet</i> , 249 U. S. 528; 63 L. Ed. 752.....	40
<i>Nichols on Eminent Domain</i> , Vol. 1, pg. 114....	78
<i>Nobel v. Douglas</i> , 274 Fed. 672.....	114
<i>Noel v. Barrett</i> , 18 Okla. 304.. 63, 66, 67, 80, 103,	130
No. 3, Land Letters, Sept. 26, O. L. 8-03, 5308, 6417	85
<i>Ohio Oil Co. v. Indiana</i> , 177 U. S. 190; 44 L. Ed. 729	77

<i>Payne v. New Mexico</i> , U. S. Adv. Op. 11 pg. 421 Oct. 1921 term, 255 U. S. 367; 65 L. Ed. 680	96, 97
<i>Payne v. Central Pac.</i> , No. 10 Adv. Ops. 347 65,	97
<i>Pennoyer v. McConaughy</i> , 140 U. S.; 35 L. Ed. 363	19, 65, 66, 75
<i>People v. Bell</i> , 237 Ill. 332; 86 N. E. 593.....	77, 136
<i>Pulliam v. Runnels Co.</i> , 79 Texas 363; 15 S. W. 277	103, 140
<i>Roberts v. United States</i> , 176 U. S. 221, 231....	120
<i>Sanders v. La Purisima Co.</i> , 57 Cal. 656.....	85
<i>Schwab v. Wilson</i> , 72 Kan. 617, 84 Pac. 123....	149
<i>School Dist. v. State</i> , 213 S. W. 961 (Ark.)....	84
<i>Shaw v. Kellogg</i> , 170 U. S. 312; 42 L. Ed. 1050	85, 98, 100, 113, 118, 123, 124, 126
<i>Shepler v. Cowan</i> , 91 U. S. 330; 23 L. Ed. 424..	96
<i>Shively v. Bowlby</i> , 152 U. S. 1; 38 L. Ed. 331..	38
<i>Slusher v. Simpson</i> , 23 Ky. L. 252; 67 S. W. 380	67
<i>Southern Oil Co. v. Colquitt</i> , 69 S. W. 169....	76
<i>Southwestern R. Co. v. Arkansas</i> , 235 U. S. 350, 362; 59 L. Ed. 265-271.....	46
<i>St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.</i> , 112 U. S. 720, 28 L. Ed. 872.....	97
<i>Sterk v. Starr</i> , 6 Wall. 402, 417, 18 L. Ed. 925..	97
<i>Speicher v. Lacey</i> , 28 Okla. 541; 115 Pac. 271..	95
<i>Sprout v. Durland</i> , 2 Okla. 24; 35 Pac. 682....	146
<i>State v. Buttzville Bank</i> , 144 N. W. 105.....	75
<i>State v. Dougherty</i> , 107 Tex. 226; 176 S. W. 717.	76
<i>State v. McMillan</i> , 12 N. D. 280; 99 N. W. 916..	84
<i>State v. McPeake</i> , 47 N. W. 691.....	75
<i>State v. Thayer</i> , 64 N. W. 700.....	75
<i>Tarpey v. Madison</i> , 178 U. S. 215; 44 L. Ed. 1042	96
<i>Terre Haute and I. R. Co. v. Indiana</i> , 194 U. S. 579, 589; 48 L. Ed. 1124, 1129.....	48
<i>Texas Co. v. Dougherty</i> , 107 Tex. 226; 176 S. W. 717	76, 136
<i>Thomasson v. Upsher</i> , 211 S. W. 325 Tex.	69, 102, 140

Pages

Thornton Oil & Gas Co., Sec. 19 and 20.....	77
Trapp v. Cook Const. Co., 24 Okla. 855.....	67, 105
Tuvar v. Corrigan, 259 U. S. 212; 66 L. Ed. 254	
.....	40, 147
Twigg v. State Bd., Utah, 75 Pac. 729.....	67
Union Pac. v. Harriss, 215 U. S. 386; 54 L. Ed.	
246	148
United States v. Bank, 15 Pet. 377.....	98
United States v. Detroit T. & L. Co., 131 Fed.	
668 Affirmed 200, U. S. 231, 56 L. Ed. 499.	98
United States v. Hughes, 11 How. 552.....	98
United States v. Iron Silver Min. Co., 128 U. S.	
673; 32 L. Ed. 571-573.....	101, 113
United States v. Midway Oil Co., 232 Fed. 631.	98
United States v. Miner, 114 U. S. 223.....	98
United States v. Nobel, 237 U. S. 74; 59 L. Ed.	
344	76, 136
United States v. Northern Pac. R. Co., 67 Fed.....	
864; 37 C. C. A. 290.....	98
United States v. Railroad Co., 91 U. S. 72.....	92
United States v. Silver Min. Co., 128 U. S. 673,	
32 L. Ed. 571.....	85
United States v. The Sadie, 41 Fed. 396.....	92
United States v. Throckmorton, 98 U. S. 61.....	98
United States v. Wagon, 67 Fed. 948; 15 C. C.	
A, 108.....	98
Vincennes v. Indiana, 14 How. 268; 14 L. Ed.	
416	105
Walpole v. St. Board, 163 Pac. 843.....	127, 133
Ward v. Love County Okla., —U. S.—..	47, 114, 120
Washington I. Ry. Co. v. Osborne, 160 U. S. 103	148
White v. Douglas, 11 Pac. 860 (Calif.).....	67
Wing v. Dunn, 127 S. W. 1101.....	67, 75
Witherspoon v. Duncan, 71 U. S. 210; 18 L. Ed.	
339, 342	97

h

Pages

<i>Witt v. Beauson</i> , 98 U. S. 113; 25 L. Ed. 925, . . .	97
<i>Work v. U. S. Supra</i> ,	101, 117, 120
<i>Wyoming v. U. S.</i> , 255 U. S. 489; 41 Sup. Ct. Rep. 393; 29 L. Ed. 423,	85, 97, 101
<i>Yazoo and Miss. Valley R. Co. v. Mullins</i> , 249 U. S. 531; 53 L. Ed. 754,	40, 41
<i>Yick Wo v. Hopkins</i> , 118 U. S. 356,	141

Supreme Court of the United States

OCTOBER TERM, 1923

No.

WILLIAM T. PRICE AND ORA PRICE,

Plaintiffs in Error,

vs.

MAGNOLIA PETROLEUM COMPANY, A JOINT STOCK ASSOCIATION; JOHN SEALEY, E. R. BROWN, R. WAYERLY SMITH, E. E. PLUMLY, AND W. C. PROCTOR, TRUSTEES; STATE OF OKLAHOMA, EX REL. COMMISSIONERS OF THE LAND OFFICE OF THE STATE OF OKLAHOMA, AND EX REL. S. P. FREELING, ATTORNEY GENERAL OF THE STATE OF OKLAHOMA,

Defendants in Error.

ORIGINAL BRIEF OF PLAINTIFFS IN ERROR AND RESPONSE TO MOTION TO DISMISS

Statement of the Case

The Congress, by the Enabling Act for Oklahoma, 34 St. at L. 267 (Act of June 16, 1906), granted the new State in trust for certain purposes, certain lands embraced in Sections 13, 16,

33, and 36 of each Congressional Township, and certain "lieu lands" and certain other lands and moneys (Sec. 7, 8, 9, 10).

The land and the rights thereto, claimed by William T. Price and Ora Price, Petitioners in Error, is a part of Section No. 33, to-wit, the Northeast Quarter (N. E. ¼) of Section Thirty-three (33), Township 1 South, Range 8 West, of the Indian Meridian, in Stephens County, Old Oklahoma Territory. The rights claimed by Mr. and Mrs. Price arise under Section 10 of the Enabling Act, which relates to Section 13 and 33, and which reads as follows:

"University and public institution lands—sales or leases—appraisal of improvements—payment by purchaser. That said sections thirteen and thirty-three aforesaid, if sold may be appraised and sold at public sale, in one hundred and sixty acre tracts or less, under such rules and regulations as the Legislature of said State may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, but such lands may be leased for periods of not more than five years, under such rules and regulations as the Legislature shall prescribe, and until such time as the Legislature shall prescribe such rules these and all other lands granted to the State shall be leased under existing rules and regulations, and shall not be subject to homestead entry or any other entry under the land laws of the United States,

whether surveyed or unsurveyed, but shall be reserved for designated purposes only, and until such time as the Legislature shall prescribe as aforesaid such lands shall be leased under existing rule: Provided, That before any of said land shall be sold, as provided in sections nine and ten of this Act, the said lands and improvements thereon shall be appraised by three disinterested appraisers, who shall be non-residents of the county wherein the land is situated, to be designated as the Legislature of said State shall prescribe, and the said appraisers shall make a true appraisement of said lands at the actual cash value thereof, exclusive of improvements, and shall separately appraise all permanent improvements thereof at their fair and reasonable value, and in case the leaseholder does not become the purchaser, the purchaser at said sale shall, under such rules and regulations as the Legislature may prescribe, pay to or for the leaseholder the appraised value of said improvements and to the State the amount bid for the said lands, exclusive of the appraised value of improvements; and at said sale no bid for any tract at less than the appraisement thereof shall be accepted." (Italics ours.)

The Prices are within the class of "lessees" of this land, within the meaning of this Act of Congress and as such claim that Congress granted them a *preference right to buy* the said quarter, in preference to all others; a property of value; a specie of "option;" or special privilege; and claim that Congress, by said Section 10, carried over the Lessee's rights under the territorial status includ-

ing a right or re-lease under "existing rules" that was and is a property right. The case has proceeded to this point almost purely as a question of law, there being no controversy of fact, procedure, or instruction. We therefore present the Acts and Statutes involved.

The State of Oklahoma, in its Constitution, accepted this land under the "conditions and limitations" imposed by the Constitution of Oklahoma, Article XI, Sec. 1, reading as follows:

"The State hereby accepts all grants of land and donations of money made by the United States under the provisions of the Enabling Act and other Acts of Congress, for the uses and purposes and upon the *conditions*, and under the *limitations* for which the same are granted or donated; and the *faith of the State* is hereby *pledged* to preserve such lands and moneys and all moneys derived from the sale of any of said lands as a sacred trust, and to keep the same for the uses and purposes for which they were granted or donated." (Italics ours.)

And the State authorized the sale thereof, as contemplated by the Enabling Act, in Constitution of Oklahoma, Article XI, Sec. 4, reading as follows:

"All public lands set apart to the State by Congress for charitable, penal, educational, and public building purposes, and all lands taken in lieu thereof, *may be sold* by the State, under such rules and regulations as the Legislature may prescribe, in conformity with the

regulations of the Enabling Act." (Italics ours.)

The First Legislature of Oklahoma, in contemplation of this authority to sell and preparatory thereto, enacted a statute looking to the appraisal of said land as called for by Section 10 of the Enabling Act, *supra*. This State Statute appears herein as Appendix "A," hereby referred to; and is cited as S. L. 1907-8, P. 484, Chap. 49, Art. II, approved April 8, 1909.

This appraisal was made, and as to this particular tract, returned Jan. 12, 1909, (Rec. 98, 100).

The said First Legislature also passed an Act cited as S. L. 1907-8, Chap. 49, Art. III, P. 496, which so far as deemed necessary here, reads in Section 21, page 489, as follows:

"Sec. 21. All preference rights, vested rights and equities shall be inherent rights."

The said First Legislature also passed a Statute, cited as Session Law 1907-8, Art. IV. Chap. 49, P. 490, approved May 26, 1908, which reads as follows:

(APPENDIX "B" ALSO)
An Act.

TO AUTHORIZE the Commissioners of the Land Office to Lease Public Lands for Oil and Gas purposes.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. When any tract of the school and other public lands, granted to the State of Oklahoma under the Act of Congress known as the "Enabling Act" is, by the commissioners of the land office of the State, known to contain oil or gas, or where such lands are, by said commissioners, deemed valuable for oil and gas purposes, such commissioners shall enter of record in their office, their finding, declaring that such oil or gas character exists, and further declaring that the oil and the gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this Act.

Sec. 2. Each agricultural, timber, grazing or other lease to any surface interest in the deposits segregated, as provided in section one hereof, and further reserve to the State and its lessees and grantees the right to drill and operate oil and gas wells on such premises, and the easement use and

right of way to enter upon and fully enjoy the mining right reserved in this Act.

Sec. 3. The oil and gas interest described in this Act in such lands may be leased by the commissioners of the land office for oil and gas purposes to the same extent and in the same manner as a private owner of lands in fee could, in his own right, execute a grant thereto, subject, however, to the following limitations:

First. For a period not exceeding five years, with suitable provisions for preference right to release for a second term of five (5) years at its expiration, at the maximum rate of rentals, royalties and bonuses that may be obtained therefor, at the time of such renewal.

Second. Upon due advertisement and public notice of not less than thirty days, in such manner as such commissioners may, by rule, prescribe.

Third. Such leasing shall be done under public bids and awarded to the highest responsible bidder; Provided, the commissioners of the land office shall have power to reject any and all bids.

Sec. 4. The lease contract of the State with any lessee for oil and gas purposes, shall stipulate, and the advertisement for bids for leasing such land shall specify a fixed royalty, to be determined by the commissioners of the land office, and

in no event less than 12½ per centum of the total output of such oil and gas, and in addition thereto any bonus offered for such lease, and shall also require a deposit of sufficient earnest money in the hands of such commission as such commission may require to accompany each bid, with appropriate conditions of forfeiture for failure to comply with the terms and conditions of bidding upon such lands. All leases for oil and gas provided in this Act shall contain a provision requiring the lessee to drill a sufficient number of wells upon the leased premises to offset the wells upon adjoining contiguous premises, and a further provision that a failure to faithfully operate the leased premises for oil and gas to as full an extent as individual and corporate premises are being operated within the general oil and gas field where such land is located, shall forfeit such lease to the State. No transfer or assignment of any lease shall be valid or convey any right in the assignee without the consent in writing of the commissioners of the land office. The board of land office commissioners shall require a good and sufficient bond for the faithful performance of said lease and may make such additional rules and regulations covering same as are not specifically provided for in this Act.

Sec. 5. No lease shall be executed to, or in the interest of any pipe line or transportation company, or any company allied to, or confederated therewith or any subsidiary company thereof, nor any other company, corporation, person or association under the control of either or all of them, nor to any stockholder, officer, director, agent, representative or employee, acting singly or as firms or corporations of such company, or either of them. Leases executed under the terms of this Act shall stipulate that, for any refinery or crude oils and its products and by-products, owned, operated or controlled by the State, the State shall have the preference right to purchase and receive the output of such oil and gas lease at the market price thereof; Provided, nothing in this Act shall prevent the lessee from selling the output of said leases to any person, firm or corporation whatsoever until notice in writing from the commissioners of the land office shall be served on the lessee that the State is ready to take such oil and gas, or either of them, and all sales of oil and gas under this proviso shall be valid and binding.

Sec. 6. Any person, firm or corporation leasing under the provisions of this Act, and operating for oil and gas, shall be liable to the surface owner, the lessee or purchaser, for all damages or loss ac-

cruing to the surface interest in said land and to all crops and improvements thereupon and appurtenances and hereditaments thereunto belonging, whether said land be agricultural, timber, grazing or otherwise.

Sec. 7. Should the lessee or owner of the surface interest and the lessee of the oil and gas interest specified in this Act be unable to agree upon the damage and loss sustained by such surface lessee or owner by such lessee of the oil and gas interests therein, may condemn the same for such purpose under the law of eminent domain to like extent and in the same manner and upon the same procedure and remedies as is provided for the assessment of damages and compensation to the owner of the fee in case of condemnation for railway purposes.

Sec. 8. The commissioners of the land office shall have plenary power and authority to enter their finding of record in their office, modifying, altering or vacating any order, finding, or entry, and when any tract or parcel of land shall be proven to be valueless for oil and gas purposes, or such tract of land or the oil and gas field in which the same is situated shall become impoverished and exhausted, then such commissioners shall enter of record of their finding of such non-oil and gas

bearing character, or of such exhausted or valueless condition for such oil and gas purposes, and when so entered of record by such commissioners, the oil and gas character of such land shall conclusively terminate. Upon premises leased for oil and gas purposes, no finding or other entry of record shall be made, modifying, altering or vacating any order, finding or entry, previously made until notice of not less than ten days shall be given by registered mail to the last known address of such lessee, or by posting notice in writing in a conspicuous place upon the premises vacated by such new finding, order or entry.

Sec. 9. The proceeds derived in bonuses and royalties and from other inducements and considerations for the execution and operation of the oil and gas leases in this Act provided, shall be carried into the several funds, for the use and benefit of which such lands were granted to the United States to the State of Oklahoma, and to the territory now comprising the area embraced within the said State under the provisions of the Enabling Act, and any and all other Acts of Congress, for the uses and purposes, and upon the conditions and under the limitations for which the same were granted, and the money resulting from such lease and

from the operation thereof shall be handled, disposed of and used in like manner as the other moneys belonging to said several funds under the laws of this State.

Sec. 10. All Acts and parts of Acts, rules and regulations, as well as the alterable provisions of the schedule of the Constitution of the State, in conflict herewith, are modified, amended and repealed to conform hereto.

Sec. 11. An emergency is hereby declared, by reason whereof it is necessary, for the immediate preservation of the public peace and safety, that this Act take effect from and after its passage and approval.

Approved May 26, 1908.

(It also appears herein as Appendix "B", and is usually referred to as the "deem" Statute, or "segregation" Statute.)

This Statute is challenged as being repugnant to the Enabling Act, Sec. 10, *supra*, and repugnant to the Constitution of the United States, Art. 1, Sec. 10; particularly as construed, or applied, to petitioners and this tract of land as denying Petitioners the right to buy granted by Sec. 10 of the Enabling Act; as impairing petitioners contract right to buy this particular tract offered and tendered them by the Enabling Act, Sec. 10, *supra*, and

accepted by them, as evidenced by their purchasing a lessee's rights and improvements, long established, and by becoming lessees themselves: that it is repugnant to the Constitution of the United States, as depriving petitioners of property and liberty without due process of law, contrary to Amendment V of the Constitution of the United States, and as taking petitioner's private property for public use without just compensation; contrary to Article V of the Constitution of the United States, and as abridging the privileges and immunities of them, the petitioners, citizens of the United States, and, as depriving them of liberty and property without due process of law; and as denying them, particularly, the equal protection of the laws accorded to others in similar circumstances, all contrary to the Amendment XIV of the Constitution of the United States.

The petitioners were defendants below, and in their answer and arguments, briefs and pleas, urged these points and questions as defense, and affirmatively claimed these rights, and protection of the Courts of the United States; and the Supreme Court of the State of Oklahoma, being the highest court in said State in which hearing could be had, denied same, and held in effect that the lessees took no en-

forceable or defensible right by the Enabling Act, Sec. 10; that the State could do as it pleased with the land and its contents, so long as the lessees were paid for "damages to their agricultural lease"; which was equivalent to saying they took nothing by the Enabling Act, and other Acts of Congress, and Statutes and Constitution of the State, for the Constitution of the United States to protect.

The Second Legislature of Oklahoma passed a Statute, approved March 2, 1909, cited as Session Law 1909, Chap. 28, Art. II, at P. 448, (appearing herein as Appendix "C") which specifically provided for sale of Section 33. For present attention, we quote and re-cite as follows:

"Sec. 1. The Commissioners, * * * shall dispose of, sell and convey, subject to such limitations, exceptions and conditions, rules, regulations, and instructions as provided in the Enabling Act, in this Act, or any Act amendatory hereof, * * * all the following lands (describing them); also the lands embraced in Section 33 in that part of the State known as the Oklahoma Territory, and granted to the State for charitable, and penal institutions and public buildings, etc. * * *

"Provided, further, that where any part of any of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of said land shall not be sold prior to Jan 1st, 1915." (Italics ours.)

"Sec. 3 (b) (on page 451) provided, *inter-alia*,—

"Any lessee holding a lease on any of the lands described in Sec. 1 of this Art., except New College lands, shall have the preference right to purchase one hundred and sixty (160) acres so leased at the highest bid at the time of the sale, as hereinafter provided in this bill." (This is not New College Land as provided for in Sec. 12, Enabling Act.)

"Sec. 4. Said lands and improvements thereon shall be sold under the appraisalment of the year 1908, made and returned to the Commissioners of the Land Office * * * (This appraisalment made under appendix "A")."

Section 7 provided that if the lessee failed to pay the highest bid, then the purchaser was to pay him, or for him, the appraised value of the improvements.

Section 8 provided for payment for lands in "forty (40) equal annual payments," and for issuance of "certificates of purchase," etc.

Section 10 provided that "all purchasers, lessees or holders of any of the public lands of this State shall take the same, subject to the conditions of this Act," etc.

Section 11 provided that "all lands shall be sold at public auction at the door of the County Court House" where land situated, etc., (In this case, Stephens County); and, "Provided, that if no bid

shall be made, the lessee may take said land at the *appraised value.*”

Section 15 provides:

“All the lands not leased, described and enumerated in section 1 of this act, shall be opened for sale immediately upon the appraisement of the same as provided in this act and by law, and all of said lands offered for sale under the provisions of this act that are leased shall be sold upon the expiration of each lease contract, or sooner upon petition of lessee to the Commissioners of the Land Office, asking for sale of any of said lands so leased.”

Section 17, generally, made any violation of the Act by the Commissioners of agents a “felony” with imprisonment from three to ten years, and disqualification from holding office.

This Statute was mandatory in its terms as to sale, times, conditions and duties of the officers; left no discretion in them, or room for anything but obedience or disobedience.

The defendants, Prices, claimed that this Statute was within the authority of the Legislature by and under the Enabling Act, Section 10, and by the Oklahoma Constitution, Article XI, Sec. 4. This has never been challenged.

They further claim under this Statute:

I. That this was imperative legislation com-

manding the sale of said lands (here Northeast Quarter of Section 33) as the expiration of the last running lease period would be January 1, 1909; (Rec. 48, 49) (so it took immediate effect as to this land); or, at least, at termination, January 1, 1910, of the Executive extension made May 12, 1909, shortly after the passage of Appendix "C" (Rec. 50-51, Exhibit "E") See. 15, *supra*.

II. That it granted Price, as a lessee, a preference right of purchase of the "land",—all of it, and all incidents of ownership.

III. That being subsequent to Appendix "B" no other power then lay in the Commissioners, than to carry out this Statute, of sale.

IV. That any failure to do so could not defeat Price's rights, or the protection thereof, under appendix "C", without violating U. S. Constitution.

V. That this Statute both recognized the preference rights granted by the Enabling Act, and, *for the State*, granted a preference right of purchase of the land (See Sec. 3 (b), *supra*), and at the appraised value if no bids made therefor; (Sec. 11, *supra*; also Appendix "C").

VI. That this Statute constituted a legislative offer, or proffer to the lessees, and when ac-

cepted, and relied upon, constituted a contract protected by the Constitution of the United States, Article I, Sec. 10, against impairment by the State or any authority under it.

(The land was held by a lessee, under previous legislation, rules and regulations, deraigning title and possession since 1902, (Rec. 42 to 50); Price contracted to buy his possession, status, preference under the Enabling Act, improvements and rights in the fall of 1908, (Rec. 154); and made final payment and took assignment in October, 1909, (Rec. 51-52) paying \$2050.00 therefor; this was after this last above referred to Statute ("C") was passed. He therefore accepted, took under, and relied upon this legislation and continued in possession thereunder, always asserting his right and title.)

VII. The defendants below, (Mr. and Mrs. Price), claimed, and as petitioners, now claim that this Statute had the effect, first, of repealing the Statute of May 26, 1908, *supra*, (Appendix "B"), even if same were constitutional, as to all lands covered by this Statute, (Appendix "C"), and ordered sold, including the land here involved, because these two Statutes, Appendices "B" and "C" could not co-exist.

VIII. Of constituting a proffer by the State to the lessee of the purchase of the land held by him under the terms and conditions in said Statute, under rule of *Burton v. Traver*, 130 U. S. 232; and that he could confidently become, or remain a lessee relying thereon for the ultimate acquirement of title to said land, and all of it, and all of its contents, in fee, with full rights of sovereignty and exclusive enjoyment; and which the State could not, under Dartmouth College case, and authorities therein cited, take away.

IX. That they had taken under said Statute and Enabling Act, and Constitution of Oklahoma and the Constitution of the United States, from one whose rights were vested and fixed under former Legislation, both Federal and Territorial, and the rules and regulations and decisions relating thereto; and thereby established a contractual relation with the United States, and State, to use, improve and acquire and enjoy said land, which was a contract protected by the Constitution of the United States, Article 1, Sec. 10, and the Amendments V and XIV; and under the rule of *Pennoyer v. McConaughy*, 140 U. S. 1.

The status of Price, as lessee, and of his predecessors in title, and this legislation, is not ques-

tioned, and the point at issue arises from the proceedings following, under which plaintiff, Magnolia Petroleum Company, and the State, defendants in error, here claim.

The Commissioners of the Land Office of Oklahoma held a sale of the lands in Stephens County, Oklahoma, (in which this land is situated) as is set out and cited in detail hereinafter under caption, "Facts Under the Statutes." P. 24.

At this sale, January 11, 1911, Price appeared and offered to take the land at appraisal. The Trial Court found he did all the law required of him, and found all facts and law for him, (Rec. 155, finding 13, and finding 8). Price claims that then and there he bought the land and acquired legal and equitable estate therein, and that he could not be defeated of his right by any act of omission or commission, by the Commissioners or other agents or officers of the State under rule of *Lytle v. Arkansas*, 9 How. 333; 13 L. Ed. 153, and cases, *post, infra*, (p. ²⁷~~34~~).

In this state of affairs, the Commissioners of the Land Office of Oklahoma, on August 26, 1915, passed a resolution found in Record on page 80, as Exhibit "C". By this it is contended by the Defendants in Error that the Commissioners withdrew

this land from the Prices' claim of purchase in 1911; and from preference right under the Territorial rules and regulations carried over by Enabling Act and preserved by the constitution of Oklahoma; and from preference right under the Enabling Act, Sec. 10, *supra*; and from preference and other rights to buy, and duty to sell under the Statute, abstracted above (Appendix "C" herein); and from any and all other rights Prices might claim.

They can claim this right to segregate and withdraw from effect of all laws, only by virtue of the "deem" Statute quoted above, and appearing herein as Appendix "B".

It has not been otherwise contended.

Subsequent thereto, and in October, 1915, the Commissioners sold an "oil lease" on said land for $\frac{1}{8}$ royalty and \$165.25 "bonus" (Rec. 82), but this lease was relinquished voluntarily on January 3, 1918, (Rec. 85). No action was taken after this by the Commissioners as to this land, other than to issue the alleged "oil and gas" lease to the plaintiff, Magnolia Petroleum Company on January 4, 1919 (Rec. 14, Exhibit "A"), involved herein.

When the Magnolia Petroleum Company essayed to enter under this "lease", Price, in possession, resisted. The District Court enjoined Price

in this suit, and being thus tied, he yielded to constituted authority, and the Magnolia Petroleum Company entered on and drilled the land, located a supply depot thereon, destroyed the use and fences, and improvements, except the buildings, and made the farm uninhabitable, all as more fully appears herein.

Statement of Specific Facts.

This action involved adverse claims to the Northeast Quarter (NE $\frac{1}{4}$) of Section 33, Township 1 South, of Range 8 West of the Indian Meridian, Stephens County, Oklahoma. It was granted to Oklahoma by Enabling Act (34 St. at L. 267). The defendant Price was the last of a chain of lessees of said land, which chain began shortly after the opening of the Kiowa, Comanche and Apache Country to settlement in 1901, under 31 St. at L. 680. By that Act this land was reserved from settlement. The first term ran from June 8, 1902, to January 1, 1905, (Rec. 42). The next term ran to January, 1908, (Rec. 45); the next term ran by legislative extension to January 1, 1909, (Rec. 48-9, Exh. C); by authorized executive order it was extended to December 31, 1909. (Rec. 50-1, Exh. E).

The defendant Price bought out a prior lessee's possession, improvements and rights, in the fall of 1908, (Rec. 154), and took an assignment on final payment in October, 1909, (Rec. 51-52, Ex. F' and Rec. 96) paying \$2050.00 for the then lessee's rights. Price's title, possession and status, as lessee, has not been questioned, and the case was tried on the theory that whatever rights a lessee could have in said land he had, and that the case was desired to determine the substantive rights, under Enabling Act.

The plaintiff, Magnolia Petroleum Company, claims under an alleged "oil and gas lease" executed by the Commissioner of the Oklahoma Land Office on January 4, 1919. (Rec. 14.)

When the Magnolia Petroleum Company attempted to enter upon this land for the exploration of oil and gas, the defendant, William T. Price, being in possession, and in good standing and fully paid up, refused entry and the Magnolia Petroleum brought this action May 25, 1920, to enjoin the defendant, Price, from keeping it off the land. A restraining order was issued by the District Court of that county against Price. The Magnolia Petroleum Company, under this protection, entered upon and developed the land, drilling many wells and

destroying much of Price's improvements, and taking possession of most of this land and destroying the use of the remainder.

Price's improvements consisted of a farm house, barns, fences, wells, an apple orchard of six hundred trees, etc., etc., valued by state appraisers on January 12, 1909, at \$1290.00; land at \$3000.00, (Rec. 98-100). On August 26, 1915, the Commissioners of the Land Office of Oklahoma declared said land "valuable for mineral purposes and that the same be segregated and withheld from sale," (Rec. 80), and on January 4, 1919, executed this lease to the Magnolia Petroleum Company. This action of the Board is challenged as violating Price's rights under the Constitution of the United States and the Enabling Act, 34 St. at L. 267, Sec. 10.

Statement of Fact Under the Statutes.

Conformable to the statutes (Appendix "A") the land was appraised in January, 1909, (Rec. 98). No "deeming" of value for oil and gas purposes was made and declared by the Commissioner of the Land Office as to this land, between passage of the "deeming" statute, (Appendix "B") on May 26, 1908, and the passage of the sale law, (Appendix

“C”), on March 2, 1909. No “deeming” declaration was made until August 26, 1915. (Rec. 80.) At this time Price contends that the “deeming” law of 1908, (Appendix “B”) was

1st. Repealed, by the sale law, (Appendix “C”)

2nd. If existent, was

(a) Repugnant to the Enabling Act, Sec. 10.

(b) Repugnant to the Constitution of the United States as impairing his contract and the rights arising under the Enabling Act and the Sale Statute (Appendix “C”).

Under the Sale Statute, (Appendix “C”), the Commissioners caused all the lands in Stephens County District (of 5 counties) to be appraised, and held an auction at Stephens County Court House on January 11, 1911, and thereat the other three quarters of this Section No. 33, were sold, and all of the adjoining Section 34, lieu land, was sold at appraisal (Rec. 117-8, par. “nine”) and all the lands granted by the Enabling Act, in said county to except the quarter in question and one other, was sold; all at appraisal and all to lessees; and approximately the same ratio of sales was had in all adjoining counties in the same sales district; that at that sale Price

appeared and insisted that this land be sold to him and offered to take it at appraisal, thereby complying with law and acquiring equitable title (Rec. p. ¹⁶⁵ §). It was so found by the Trial Court, (Rec. 155, finding 8^{and 10}). There was no other bid thereon; that the land was not *known* to be of value for oil and gas purposes until 1920, and after this suit was instituted and it was so found by the Court, (Rec. 155, finding 11); that the Trial Court found all issues of law and fact in favor of Price, defendant, (Rec. 155, finding 13); that Price was a qualified "lessee" under the Enabling Act, and had complied with the Sale Law of 1909, (Appendix "C") and earned his title to said land and that he held: (1) such a right under the Enabling Act to preference of purchase of the land, and all of it, as could not be taken or impaired by the State or Commissioners, by the attempted "deeming" of value for oil and gas purposes made August 26, 1915, under the Statute, (Appendix "B"); (2) Such a right of purchase under the Enabling Act, and the Sales Law (Apx. "C") as could not be subsequently taken from him by the State in part or whole, acting by Statute (Appendix "B"), or otherwise; (3) That the alleged oil and gas lease, under which the Magnolia Petroleum Company claimed, was unauthorized, illegal and void as to Price and this land; that the

Magnolia was a trespasser *ab initio*, and liable in accounting to Price for damages done and oil and gas taken, following *Guffy v. Smith*, 237 U. S. 101. (For trespass after notice, see 237 U. S. 118-119.) (Decree, Rec. 152-159.)

That the Supreme Court of Oklahoma reversed this judgment holding in effect that the state took the land with power to do with it as it pleased, so long as its oil lessee paid the original lessee, Price, his "damages sustained to his agricultural lease by reason of the operation of wells," and that he could not interfere, with the "oil lessee" (Rec. 186), and that Price had no rights other than a temporary occupant, without right, or term, would have.

Questions Presented.

This record presents then, clearly and unequivocally, and it is the desire of all parties so to do, the questions—

1st. As to what right, if any, was granted by the Enabling Act, Section 10, to the lessee holding the lands granted by that Act to the State, by his "preference right of purchase."

2nd. Were the rights so granted such rights as, when accepted and relied upon by the lessee, could not be impaired, taken or avoided by the

State, as by its Legislation, (Appendix "B" herein) without violating the Constitution of the United States?

3rd. Were the rights granted to Price, lessee, by the Sale Statute, (Appendix "C"), such rights as, when accepted and relied upon by him, could not be subsequently impaired by the State, or its Commissioners acting under the authority of the State, and particularly by their "deeming" the land valuable for oil and gas purposes, (Under, Appendix "B") on August 26, 1915, without violating the Enabling Act and the Constitution of the United States?

4th. Were the rights held by Price, as lessee, under the Enabling Act and the Sales Statute, (Appendix "C"), and the Constitution of the United States such rights as could not be impaired, avoided or taken by the State as by Statute (Appendix "B"), and the authority exercised by the Commissioners, thereunder, in executing the oil and gas lease to the Magnolia Company, January 4, 1919, without violating as to Price, the Constitution of the United States?

5th. Summarizing, was the act of the Legislature of 1908, (Appendix "B") constitutional as to

Price, and this particular land, and were the proceedings of the Commissioners thereunder,—

(a) in "segregating" this land by their "deeming" resolution on August 26, 1915, and

(b) in leasing it for oil and gas purposes on January 4, 1919, (while held and possessed by Price under the Enabling Act and Sale Statute of 1909 (Appendix "C")) constitutional?

Contention of Parties.

The plaintiff, Magnolia Company, Trustees, contends that the State took said lands as patentee with "plenary power" over it to do with it as it pleased; that the State, and its Commissioners could divide the land, both as to use and elements, leasing the surface to one, the contents to another; could sell the minerals therein separate from, and dominant of the surface interest and lessee, and that the preference right of purchase in the lessee, by the Enabling Act, if any, extended only to the relief after the State and mineral lessee was satisfied to let it go.

The defendant, Price, contends that the Enabling Act, Section 10, gave the State only limited authority over said land, such authority being

- 1st. To hold it as a trust estate, or
- 2nd. To sell it as a trust estate,

Errien, Commissioner v. U. S., 251 U.
S. 41; 64 L. Ed. 128,

Betts v. Commissioners, 27 Okla. 64.

That if the State elected to hold the land and lease it, the land could be leased,

- 1st. For "periods" *not exceeding* five years;

- 2nd. Under "*existing rules and regulations*"
(which appear in Rec. at 133-134 with
letter of Governor Steele, 129-133),

until the Legislature presented new rules, Enabling
Act, Sec. 10, which it did not do; or,

- 3rd. That the State may sell said land

- (a) Under such rules and regulations
as the *Legislature* may prescribe.

- (b) Preference right to purchase at
the highest bid being given to the
lessee. (Enabling Act, Section 10).

The effect of this last clause engenders this litigation. The defendant claimed that under the Enabling Act, Section 10:

- 1st. A preference right of lease and release
that insured him secure tenure and ex-
clusive possession so long as the State
elected to lease, and not to sell.

- 2nd. That under the Enabling Act he had always a preference right of purchase of said land and all of it, both before the State's election to sell, and afterwards, but, of course, only enforceable after the State's election to sell. (Appendix "C").
- 3rd. That such preference right gave him the right to hold the land intact, free from all trespass, or disintegration, until he could exercise the option given him by Congress in the Enabling Act, Sec. 10.
- 4th. That the State, by the Sale Statute of 1909, (Appendix "C") elected to sell said land, fixing all the terms and conditions of sale, and the congressional grant of preference, and regranted to the lessee the option of preference right of purchase of the land, and all of it, (Sec. 3 b.)
- 5th. That defendant lessee accepted and relied on said preference right expressed in the law, and defendant claims that thereby such a grant contract right arose as to said lessee, and as to said land, as could not be impaired, taken, or denied by the State, except by violating the Constitution of the United States, Article 1, Section 10, and the V and XIV Amendments thereto.
- 6th. That the State Statutes (Appendix "B") in so far as it took, or purported to authorize the taking, from Plaintiffs in Error of the right granted by Enabling Act, or by Statute (Appendix "C"), to

buy the whole of said land, was a violation of Constitution of the United States, and the XIV amendment thereto.

Before entering upon a discussion of the legal questions arising in the Record, we shall consider briefly the question of law raised by the motion to dismiss for want of jurisdiction, made by defendants in error. Plaintiff and Intervenor, the State, (Defendants in Error), move to dismiss for substantial reasons not on account of any error of omission or commission; so the case is thereby presented on its merits, and the Jurisdiction of this Court.

Assignment of Errors

To boil down our rather extended assignments of Error (Rec. 204-213), and state them briefly, we allege that the Court erred:

1st. In reversing the judgment and decree of the District Court of Stephens County, Oklahoma, on the findings made, and unreversed.

2nd. In holding that the Statute (Appendix "B") was not repugnant to the Enabling Act and Constitution of the United States, as to Price.

3rd. In holding that Price held no preference right of purchase of the land, and all of it, by virtue of the Enabling Act (34 St. at L. 267, Sec. 10), and by virtue of the Sales Statute (Appendix "C"), that was protected by Constitution of United States.

4th. In holding that defendant, Price, had no rights except to "damage for injury to his agricultural lease by reason of the operation of the Oil Wells," thereby denying Price all right to buy the land.

5th. In holding that the oil lease, (Rec. 14) was valid to the Magnolia Petroleum Company, effective, and authorized by law.

6th. In holding that Price had not acquired an equitable estate and title to said land by virtue of the Statute, (Appendix "C"), and his compliance therewith as found by the Trial Court, (Rec. 155, finding 10, et al.)

Answer to Motion to Dismiss Writ of Error.

That the case is one of the class named in Paragraph 237 of the Judicial Code, as amended by the Act of September 6, 1916, Chap. 448, Par. 2, providing that this Court may re examine and reverse or affirm the judgment of the highest court of a state, upon a writ of error, there being drawn in question the validity of a Statute, or an authority exercised under any state, on the ground of their being repugnant to the Constitution or laws of the United States, the decision of the highest Court of State being in favor of the validity of such Statues, or authority, seems to us to be beyond all reasonable controversy.

The right of the plaintiff in error, William T. Price, with whom is joined his wife, Ora Price, arises out of, and, we think, is protected by Section 10 of the Enabling Act. (34 Stat. at L. 267.)

This right, according to the contention of plaintiffs in error, was denied, impaired, and in effect, destroyed by the Acts of the Legislature of the State of Oklahoma complained of, and by the authority exercised under the State by the Commissioners of the Land Office, in executing an oil and gas lease to defendant in error, Magnolia Petroleum Company, on the lands previously leased and

occupied by Price, and which were ordered sold by the mandatory Act of the State Legislature, (Sess. Laws of Oklahoma, 1909, App. "C"), pursuant to the authority granted in Sec. 10 of the Enabling Act, and Constitution of Oklahoma, Art. 11, Sec. 4.

It is the contention of plaintiffs in error,—and has been from the inception of this litigation,—that the State Statutes, Appendix "B," and the authority exercised under the State, by which it was sought to create two estates in leased, public lands,—namely, one to the oil and gas, if any, in the lands, and the other to the soil and growth thereon, as well as to minerals other than oil and gas,—were repugnant to the terms of the grant, and to the rights of the lessees to purchase the land, and all of it,—except as to "*known*" mineral lands—meaning thereby, all that lay beneath the soil, as well as all that was on the surface, when sold by the State.

This conception of the rights of such lessees is, of course, in conflict with the claims of the defendants in error, who contend in effect that the lessees were given only a preference right to purchase the surface of the land, whether of "*known*" or "*unknown*" mineral value and that by virtue of

State legislation and of the authority exercised under the State, the latter had the right to lease, and the Magnolia Petroleum Company had the right to acquire the oil and gas underneath the leased premises, although not "known" to be of mineral value.

The case presents, therefore, the clear-cut issue as to whether the State Statute, and the authority exercised under the State, conflict with the preference right to purchase this land and its contents, when sold by the State.

A reasonable construction of the provisions of the Enabling Act, we think, must lead to the conclusion that when the land was ordered sold by the legislature of the State, the preference right to purchase, at the highest bid, being given by the Enabling Act, and by state legislation, to the lessee at the time of such sale, it was intended to, and did, in fact, confer on such lessee the indestructible right to purchase the fee to all of the land not known to be valuable for minerals, and that also, after Jan. 1st, 1915, and by him theretofore leased; and not merely a limited estate therein.

Consistently throughout the progress of the case, defendants below (plaintiffs in error here) set up their rights, under the Enabling Act, and urged

that the Act of the State Legislature of Oklahoma, (Appendix "B") and of the authority exercised under the State, (Rec. 80) were in conflict with the terms of the Enabling Act, and with the rights vouchsafed them under the Federal Constitution.

These contentions were set up repeatedly, and at length, in their answer; were recognized in the petition of intervention by the State of Oklahoma; were considered and upheld by the trial court; and denied in the opinion of the State Supreme Court; were again urged in the defendant's petition for rehearing, and were set out in the assignments of error and the petition for writ of error to the Supreme Court of the United States. Believing at the outset of the litigation that Federal questions were involved, defendants, with undue prolixity, perhaps, were careful to urge, at each step of the litigation, their rights under the Federal Constitution and the Enabling Act.

That the case does involve Federal questions,—or at least, a Federal question,—and that this Court has jurisdiction to re-examine and reverse or affirm the Supreme Court upon a writ of error,—a petition for writ of *certiorari* having heretofore been denied in case No....., on the docket of this Court,—is, we think, clearly shown.

We are, of course, dealing now with the question of jurisdiction of this Court, and not with the propositions of law that are discussed elsewhere herein.

It is with much hesitation that we undertake to discuss in this Court questions pertaining to the Court's jurisdiction, knowing full well our inability to add a single thought to what has been so often, and so very clearly and fully stated in the many opinions passing upon the question of the court's jurisdiction, and, of recent years, by writ of error in certain classes of cases, and by *certiorari* in other classes, as provided in Section 237 of the Judicial Code, and as amended February 17, 1922.

We shall, however, take the liberty of citing and quoting from a few opinions of the Court,— principally, recent ones since the amendment of September 6, 1916,— as bearing upon, or determining the question of the Court's jurisdiction of the instant case.

In *Shively v. Bowlby*, 152 U. S. 1, 38 L. Ed. 331, it was said that the counter-claim of defendants depended on the effect of the grant from the United States to Shively of land bounded by the Columbia River, and of the conveyance from Shively to defendant, as against the deeds from the State

to the plaintiff. The only matter adjudged was upon the counter-claim. The judgment against the validity of defendant's claim proceeded upon the ground that the grant from the United States, upon which it was founded, passed no title or right, as against the subsequent deeds from the State, in lands below high water mark. This, it was held, was a direct adjudication against the validity of a right, or privilege claimed under a law of the United States, and presented a Federal question within the appellate jurisdiction of this Court. Furthermore, it was said that jurisdiction has repeatedly been exercised by the Court, without objection or doubt, in similar cases, of writs of error to the State Courts,—citing cases.

The opinion in the *Shively* case has since been cited as authority, in *Hardin v. Shedd*, 190 U. S. 508, 47, L. Ed. 1156; and in *Ferris v. Frohman*, 223 U. S. 424, 56 L. Ed. 492.

In taking up a few of the recent opinions of this Court,—all of which were decided since September 6, 1916, and which involve either a construction or application of the Judicial Code,—we cite the following:

Darling v. Newport News, 249 U. S. 540,
63 L. Ed. 759;

Yazoo & Mississippi Valley R. Co. v. Mullins, 249 U. S. 531, 53 L. Ed. 754;
New Orleans & Northeastern R. Co. v. Scarlet, 249 U. S. 528; 63 L. Ed. 752;
Mackey Tel. & Cable Co. v. Little Rock, 250 U. S. 94, 63 L. Ed. 863;
Kenney v. Loyal Order of Moose, 252 U. S. 411, 64 L. Ed. 638;
Merchants' Nat'l Bank v. City of Richmond, 256 U. S. 635; 65 L. Ed. 1135;
Kansas City So. R. Co. v. Road Improvement District No. 6, 265 U. S. 658, 65 L. Ed. 1151;
Lake Erie Western R. Co. v. State Public Utilities Commission, 249 U. S. 422, 63 L. Ed. 684;
Tinjar v. Corrigan, 259 U. S. 212, 66 L. Ed. 254.

In *Darling v. Newport News*, 249 U. S. 540, 63 L. Ed. 759, first above cited, it was held that a judgment of the highest Court of a State, which affirmed the dismissal below of the bill in a suit to enjoin a municipality from discharging its sewage in such a way as to pollute and ruin plaintiff's oysters, upon his beds under the tidal waters, is reviewable in the Federal Supreme Court, where the bill alleges that if the applicable State Statutes purport to authorize destruction of plaintiff's oysters they are contrary to the Constitution of the United States, and especially, the Fourteenth Amendment, and in the assignments of errors to the highest State Court the Statutes are said also to violate the contract clause of such Constitution.

In *Yazoo & Mississippi Valley R. Co. v. Mullins*, 249 U. S. 531, 53 L. Ed. 754, it was held that a question as to a conflict between State and Federal Statutes is one which, when denied by a Court in favor of the State Statute, will sustain a writ of error from the Federal Supreme Court to the State Court.

In *New Orleans & Northeastern R. Co. v. Scarlet*, 249 U. S. 528, 63 L. Ed. 752, it was held that a writ of error, not *certiorari*, is the proper method of reviewing in the Federal Supreme Court a judgment of the highest Court of a State, in a case in which the conflict of a State Statute with a valid law of the United States was involved, and the decision was in favor of the validity of the State Statute.

In *Mackey Tel. & Cable Co. v. Little Rock*, 250 U. S. 94, 63 L. Ed. 863, this Court held that a decision of the highest Court of a State, adverse to the contention that the taxing provision of a telegraph franchise ordinance as construed and applied, has the effect of depriving the Telegraph Company of rights secured to it by the Constitution and the laws of the United States, is reviewable in the Federal Supreme Court, by writ of error.

In *Kenney v. Legal Order of Moose*, 252 U. S. 411, 64 L. Ed. 638, it was held that a writ of error,

not *certiorari*, is the proper mode of reviewing in the Federal Supreme Court, a judgment of the highest Court of the State, upholding a State Statute, challenged as repugnant to the Federal Constitution.

In *Merchants' National Bank v. City of Richmond*, 256 U. S. 635, 65 L. Ed. 1135, it was held that a writ of error, not *certiorari*, was the proper method of reviewing in the Federal Supreme Court, a judgment of the highest Court of a State, in a suit in which the defeated party below drew in question the validity of a municipal ordinance, and the Statute sanctioning it, as construed and applied, upon the ground of their alleged repugnance to a Federal Statute, and the State Court sustained their validity notwithstanding such contention.

In *Kansas City So. R. Co. v. Road Improvement District No. 6*, 256 U. S. 658, 65 L. Ed. 1151, it was held that the validity of a State Statute, under the Federal Constitution, having been adequately challenged in the State Courts, the case may be brought up to the Federal Supreme Court by writ of error, and *certiorari* will be denied. There it was maintained by petitioners that the assessment upon their property was unequal, arbitrary, unreasonable, and in violation of the due process and equal protection clauses of the Fourteenth Amendment.

The State Courts held to the contrary, and in effect declared the Statute providing for the Road Improvement District authorized the action taken by the Board, and that, so construed, it was a valid enactment. In this situation, it was said by this Court:

“The validity of the Statute having been adequately challenged, the case is properly here upon writ of error, and the petition for *certiorari* will be denied.”

In *Lake Erie & Western R. Co. v. State Public Utilities Commission*, 249 U. S. 422, 63 L. Ed. 684, it was contended in the Supreme Court by the Railroad Company, as it had theretofore been contended in the State Court, that the order of the Public Utilities Commission contravened the due process of law clause of the Fourteenth Amendment, in that it took property of the Railroad Company for private use or for public use, without compensation. On the question of the Supreme Court's jurisdiction, it was said:

“An order of a State Public Utilities Commission, upheld by the highest Court in the State, requiring the removal of a side-track by a Railroad Company, being legislative in its nature, and made by instrumentality of the State, is a State law, within the meaning of the Federal Constitution and the laws of Congress regulating appellate jurisdiction of the Federal Court over State Courts.”

These are but a few of the cases involving the determination and exercise of this Court's jurisdiction in cases arising under the second sub-division of Paragraph 237 of the Judicial Code.

As we have seen, plaintiff in error, William T. Price, the lessee of the land forming the subject-matter of this litigation, was by the Enabling Act given the preference right to purchase it at the highest bid when sold. The Legislature for the State elected to sell, and caused the land to be appraised, and ordered it sold. The Commissioners of the Land Office of Oklahoma claims to have refused to obey the mandate of the Legislature, as to Price's land, although he was present at the sale, offered to take it, under the Statute (Rec. 155), and, instead, caused it to be leased for oil and gas purposes to Magnolia Petroleum Company.

We contend that Price, as lessee of the land, had the right, which could not be constitutionally impaired or taken away by the Legislature, or by any authority exercised under the State, to buy the land and all of it, when sold.

If his land is to be denuded of its principal value, to wit, its contents, and the sovereignty and integrity of its surface (under Appendix "B"), then his right of purchase of the land given him by the

Enabling Act, with all that usually attends and is included in a sale of land, will be denied him.

We submit that the Supreme Court of the State, having upheld and sustained the validity of the Act of the Legislature, (Apx. "B") and of the authority exercised under the State by the Commissioners of the Land Office (Rec. 80) and the making the oil and gas lease (Rec. 14) on the lands theretofore leased to and occupied by Price, under the Enabling Act being an invasion of rights guaranteed to Price by the Enabling Act, and protected by the Federal Constitution, presents a case properly reviewable in this Court.

In reviewing the judgment of a State Court, in a case in which it was unsuccessfully contended that a State law deprived a party of rights secured by the Federal Laws and Constitution, the Federal Supreme Court is concerned, not with the characterization or construction of the State law by the State Court, nor even with the question whether it has, in terms, been construed, but solely with the effect and operation of the law, as put in force by the State, or as capable of being applied.

The foregoing is the rule recognized and often applied in this Court:

S. W. R. Co. v. Arkansas, 235 U. S. 350,
362; 59 L. Ed. 265-271;
Mountain Timber Co. v. Washington, 243
U. S. 219, 237; 61 L. Ed. 685, 696;
Crew Levick Co. v. Pa., 245 U. S. 292-294;
62 L. Ed. 295-297;
Corn Products Refining Co. v. Eddy, 249
U. S. 427; 63 L. Ed. 689.
Works Sec'y. v. U. S. ex rel. No. 251, de-
cided May 21st, 1923 (this Court).
Noble v. Douglass, 274 Fed. 672.

In the Corn Products case, there was involved the commerce clause, (Art. I, Par. 8) of the Constitution of the United States, and the Act of Congress of June 30, 1906, (Chap. 3915; 34 St. at L. 768; Comp. St. 1916, Par. 8717), known as the Food and Drugs Act. The Supreme Court of the State in its opinion said nothing about inter-state commerce, notwithstanding which it was said by this Court that in the state of the record, "defendant's activities against which relief was sought included incidental interference with plaintiff's interstate commerce" in the commodity known as "Mary Jane" syrup. Of the situation thus presented by the record, it was said in the course of the opinion:

"That the general judgment in favor of defendants amounts to an adjudication that the State law and regulations are to be enforced with respect to plaintiff's product, indiscriminately, not only when sold and offered for sale in domestic commerce, but also while in the

hands of the importing dealers for sale in the original packages, and hence, in contemplation of law, still in the course of commerce from state to state. The silence of the Supreme Court upon the subject cannot change the result in this regard. In cases of this kind, we are concerned not with the characterization or construction of the State law by the State Court, nor even with the question whether it has, in terms, been construed, but solely with the effect and operation of the law as put in force by the State."

The contention, therefore, of defendants in error that the opinion of the State Court involved merely a construction of the different provisions of the Acts of the Legislature of Oklahoma, and that "The construction so given will be accepted as conclusive in the Federal Courts," is, in view of the record and the foregoing rule respecting the jurisdiction of this Court, wholly untenable, because the State court denied the right to buy the land, or any of it, granted by the Enabling Act.

Another recent case in which, upon writ of *certiorari*, this Court reviewed and reversed the judgment of the Supreme Court of Oklahoma, is that of *Ward v. Love County*, 253 U. S. 17; 64 L. Ed. 751. In that case it was held that the right to the exemption was a Federal right, and was specially set up and claimed as such in the petition. Whether that right was denied or given recognition by the Su-

preme Court of Oklahoma was, as stated in the opinion, "a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It is, therefore, within our province to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect, as by putting forward non-Federal grounds of the decision that were without any fair or substantial support." It was further noted that if non-Federal grounds, plainly untenable, may be put forth successfully, the power to review, in the Supreme Court of U. S. may be easily avoided, citing *Terre Haute & I. R. Co. v. Indiana*, 194 U. S. 579, 589; 48 L. Ed. 1124-1129. On the particular subject of non-Federal grounds, the opinion reads:

"With this qualification, it is true that a judgment of a State Court, which is put on independent non-Federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material one, and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law, and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

So that regardless of the grounds upon which the opinion of the State Supreme Court was rested, the fact that defendants had specially set up, and

at all times urged rights secured to them by the Enabling Act and the Federal Constitution which rights are denied entitles them to have such rights considered and determined by a decree of this Court. Not to do so would, it seems to us, be, in the language of the Ward case, "neglecting or renouncing a jurisdiction conferred by law, and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof."

In short, this Court is not deprived of its jurisdiction because of the grounds upon which the State decision is based, whether that be by omission to pass upon Federal questions or silence in respect thereto, or the basing of the decision upon plainly untenable, non-Federal grounds.

It will be noted that the motion to dismiss is not directed at any error or omission, but predicated on our Federal question, being, *first*, "purely fictitious, one devoid of merit" (Motion to Dismiss, page 3, line 16) and *second*: that "plaintiffs in error have failed to show any reversible claim," which we diffidently suggest, tries the issue, and well submits the case on the merits, because if our claim has merit, it is due to the Constitution of United States or Acts of Congress.

It is *Cohens v. Virginia*, 6 Wheat 264, renewed, and there the Court quoted from the Constitution of the United States that “this Constitution, and the law of the United States * * * shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State, to the contrary notwithstanding;” and Justice Marshall, for this Court, said:

“The general government, though limited as to its objects, is supreme with respect to those objects,”

and, that it could “in effecting those objects, legitimately control all individuals, or governments, within the American territory.”

Introduction; Historical and General Statement of Case.

In 1890, when Congress organized the Territory of Oklahoma, it foresaw the necessity of endowing the schools of the territory and prospective State with an income beyond that derived from the taxable property of expected settlers. It, therefore, reserved from settlement two sections of the public lands for the purpose of being applied to the use of the public schools in the Territory and future State.¹ In this it followed a practice established since the organization of northwest territory and carried out upon the admission of all of the States since Ohio.² In some cases the lands were reserved and given outright to specific educational institutions, as Vincennes University.³ In some it was given directly to the territory with power of alienation as in Kansas.⁴ In others, as in Oklahoma,⁵ and Minnesota,⁶ it was given to the use of the territory during territorial days for its schools with a promise of conveyance to the State on organization. The power of Congress over reserved land prior to their complete alienation has universally been held to be

1. Organic Act, Section 18.

2. See Organic Act of various States.

3. *Vincennes v. Ind.*, 14 How. 268, 14 L. ed. 416.

4. *Stringfellow case*, 2 Kan. 263.

5. *Territory v. C. O. & W. Co.*, 20 Okla. 663.

6. *Minn. v. Batchelder*, 68 U. S. —; 1 Wal. 109, 17 L. ed. 551.

supreme, and the power of Congress to otherwise dispose of, encumber, or place limitations upon the title to the land prior to completion of alienation by grant of legal title, has remained unquestioned.⁷ In Oklahoma, to encourage the settlement and development of these lands and thus rapidly increase their productivity and income for the use of the public schools of the territory, and to aid the settlers in procuring homes, a temporary leasing agent was appointed, to-wit, the Governor, and later a board, to lease the lands under such rules as the Secretary of the Interior might make.⁸ The Secretary of the Interior in his wisdom made a rule which offered to any lessee leasing these lands the preference right of re-lease indefinitely.⁹ This rule was later enacted by Congress in 1894, and remained the law.¹⁰ This right of re-lease was in the nature of a preference right to continue leasing perpetually.⁹ This proposition of Congress was accepted by many people of the Territory who entered upon these lands and carried out their contract; and in contemplation of their preference rights of continuous re-lease, made permanent and

7. Union Pac. 1, Douglas 31 Fed. 540; Minn. 1, Batchelder, 1 Wall. 109; 17 L. ed. 551.

8. Act of Mar. 3, 1891, 26 Stat. L. 1043.

9. Noel v. Barrett, 18 Okla. 304.

10. Act of May 4, 1894, 28 Stat. L. 71.

immovable improvements of great value, such as fine homes, tillage, fences, orchards, etc.; thus greatly enhancing the value and productivity of the lands.

In the Enabling Act, Congress enacted that it would grant not only Sections Sixteen and Thirty-six for the support of the common schools, but also Sections Thirteen and Thirty-three as well, the former numbered sections being granted for the use and benefit of the University of Oklahoma and the University Preparatory School, the State Normal Schools, and the Agricultural and Mechanical College, and Colored Agricultural, Norman University; while sections Thirty-three were granted "for charitable and penal institutions and public buildings." The foregoing grants included only the above numbered sections in Oklahoma Territory, and certain indemnity lands in lien thereof. These grants, as a part thereof, contained certain limitations upon the power of the State, and guaranteed to the settlers holding leases on the above numbered sections, other than those provided for in Section 12 of the Enabling Act, preference right of purchase, the protection of which right gives rise to this suit. This legislation was prompted, no doubt, by the desire on the part of Congress to respect and hold in-

violate the assurances theretofore given the lessee settlers—that of ultimately acquiring the legal title to the lands occupied by them, and by reason of their acceptance of the congressional offer of 1891 and 1894 to take these lands with the preference right.¹¹

Congress, in its Deed of Trust (Enabling Act), preserved this preference right of re-lease and impressed it on the land, and its trustee.¹² Congress also granted the State permission to sell these lands under certain conditions or limitations specified and set out in the Enabling Act,—the principal one of which, so far as this case is concerned, was that the lands, when sold, should be offered for sale with the fixed preference right of purchase to the lessee.¹³ This, Congress clearly had the power and the right to do.⁶⁻⁷ The reservation of these lands by Congress was for the purpose of creating, later, a contemplated trust of the said lands to be reposed in the State as trustee, for their application to the use of the schools, and public purposes hereinbefore named, as evidenced by history.¹⁴ Such reservations, as to Sections Sixteen and Thirty-six, had uniformly been considered and held by the courts

11. Enabling Act, Section 10.

12. Enabling Act, Sections 9 and 10.

13. Enabling Act, Section 10.

14. *Territory v. C. O. & W.*, 20 Okla. 663, 95 Pac. 420.

to be reservations in trust for the use of the schools, and upon grant, to pass to the State in trust for the purposes specified therein.¹⁴ And, in the states, have been uniformly held by this Court in their administration of said lands, to be limitations, on powers and duty of a trustee.¹⁵ The people of Oklahoma, through their constitutional convention, accepted the grant proposed in the Enabling Act, upon the terms, conditions and limitations expressed in the Enabling Act, and for the uses and purposes, as to several different bodies of land, as in the Enabling Act expressly provided.¹⁶ Upon the admission of the State of Oklahoma to the Union, there came into existence a trustee empowered to take the said lands, and thereupon the legal title thereto vested in the State, in trust for the uses and purposes specified, and upon the conditions and limitations expressed in the Enabling Act and prior legislation of Congress.¹⁷

The right, therefore, of the lessee in these lands to a preference right of re-lease, and preference right of purchase, offered to him by the Congress, Enabling Act, in 1906, and accepted by him when

15. *Ervien, Com'r v. U. S.*, 251 U. S. 41, 64 L. ed. 128.

16. Oklahoma Constitution, Art. XI, Sec. 1.

17. *Minn. v. Ritchelder*, 1 Wall. 109; *Union Pac. v. Kargen*, 169 Fed. 459.

he took the land, formed a contract between the lessee and the Government which no legislation subsequent to the lessee taking possession thereunder could violate or impinge.¹⁸ It entitled him, of course, to exclusive and undisturbed possession of the land while either a lessee, or purchaser; and, of course, such right ran to the land and all of its component parts.¹⁹

When Congress offered to the lessee the use and occupation of the lands indefinitely as was the effect of the preference right of re-lease, for the annual charge or consideration therefor to be fixed by the legislative authority from time to time, it did not reserve any right or reversion, but retained only the right of re-entry for breaking of the conditions subsequent by the lessee, to-wit, non-payment, or waste. This, we think, gave the lessee an estate in perpetuity, without reversion or termination at the will of the grantor, and conditioned only upon his complying upon the two conditions subsequent of paying rent and committing no waste.²⁰ It was an estate of inheritance and a valuable property right²¹

18. *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363; *Dartmouth College case*.

19. *Texas Co. v. Daugherty*, 107 Tex. 226, 176 S. W. 717; *Ohio Co. v. Indiana*, 177 U. S. 190, 44 L. ed. 729.

20. *DePeyster*, 57 Am. Dec. 470 (N. Y.).

21. *Noel v. Barrett*, 18 Okla. 304; *Clark v. Frazier*, 177 Pac. 589.

Michael

which no legislation subsequent to its attaching, could take away.¹⁸

In this case, the Commissioners of the Land Office of Oklahoma had undertaken to violate the compact between the government as grantor, and the lessee as grantee, and between the State as trustee for the Government, to the use of the schools and for public purposes, and lessee, by taking from the lessee the benefits of his preference right to this particular tract of land and trading a part of his tract of land to the Magnolia Petroleum Company in exchange for a small percentage of the expected minerals to be produced therefrom. The form of conveyance attempted by the Commissioners to the Magnolia Petroleum Company is a grant of the minerals in place capable of indefinite prolongation, and might indeed be in perpetuity and granted exclusive possession.²² It attempted to take from the lessee not only his right of possession of the lands, but his right of profit and enjoyment thereof, and totally deprived him of the preference right to the lands, secured to and earned by him by his acceptance of the proposition made to him by Congress and the State.

22. *Guffey v. Smith*, 237 U. S. 101; *Hoyt v. Flixico*, 175 Pac. 517. Rec. 14. *Daugherty v. Texas Co.*, 107 Tex. 226.

The action of the Commissioners was also in violation of law in that the conditions of the trust were that the State should hold and use the lands for the benefit of the schools, and for certain public purposes, or might, by appropriate legislation, sell the same, preserving the whole proceeds of the sale perpetually and inviolable in trust for the fund known, as to Sections Thirty-three, the charitable and penal institutions and public building fund.²³⁻¹⁵ The conveyance to the Magnolia Petroleum Company was not a sale within this meaning of the provision, but was, in fact, an alienation,²³ and was outside of the power and authority of the State as trustee, and violated the limitations placed on the trustee by the Enabling Act and accepted by the Consitution of the State.²³ It was likewise in violation of the State legislation which forbade the acquisition of these lands by pipe lines companies.²⁴ It was an attempt, also, to alienate a part of the permanent fund last above mentioned for a small percentage of the part alienated, and thus violated the limitations of the acts of Congress, and broke the faith of the State pledged in the Constitution to its per-

23. *Thomason v. Upsher Co.*, 211 S. W. 325, Const. & Enabling Act. *Dallas v. Club*, 95 Tex. 200, 66 S. W. 294.

24. Sec. 5, Act May 26, 1908, S. L. 1907-08, Page 491, Appendix "B", Sec. 5.

manence.²³ It was a perversion of the trust and a diversion of the fund.²³⁻¹⁵ If sustained, it would permit, if logically followed, the total ultimate dissipation of the estate and the fund. It was an attempt to alienate a part of the permanent fund,—land,—under the pretense of development of the other part forbidden by the Declaration of Trust,²³ as held by the Supreme Court in the New Mexico case.¹⁵ The lessee in this case has performed every condition proposed to him by congressional legislation relating to these lands; and had done or offered to do everything which he should, or could, do under the legislation, to acquire the legal title thereto.²⁵ He held a complete equitable estate, alienable and descendable, and had earned the legal title long prior to the institution of this suit.²⁵ As against the invasion of the Magnolia Petroleum Company, he was in actual, long-continued possession, and by force and arms retained possession until he yielded respect to the Court's temporary injunction and admitted the Oil Company in trespass, to the possession and destruction of a part of his land.

Under the peculiar congressional legislation pertaining to Oklahoma, which stands alone and which

25. *Lytle v. Arkansas*, 9 How. 333, 13 L. ed. 1153; S. L. 1909, p. 448, Sec. 1; *State of Wyo. v. U. S.* 255 U. S. 489.

is distinguishable from such legislation as to school and public lands in every other state, it is clear that the State did not take the lands free and unrestricted, either with unlimited power of control of the leased land, or the unrestricted power of alienation;¹⁵⁻¹⁶⁻⁹ therefore, did not take it "in fee simple as any other owner" as is the contention of the defendants in error, but took it as trustee of a double trust. First, to collect the income for the use and benefit of the permanent fund¹⁵ for which it was granted, and, second, to secure to the lessee the rights fixed in him by congressional legislation.²⁶ In execution of such duty, it had an alternative power, either to hold the legal title as trustee and to preserve to the lessee his vested right of continuous release and possession and to collect from him the periodical payments for such use of said lands, or to sell for present sum, the right to collect said payments; i. e. to sell its legal title subject to the limitations imposed by Congress, giving preference right of purchase (pre-emption) to the lessee at the time of sale, and to preserve the gross fund thus received²⁷ in lieu of the annual payments.

The State took no such estate in the lands under lease, as would permit the Commissioners'

25. Enabling Act, Sec. 10, and Const. Okla. Art. XI, Sec. 1.

27. Enabling Act, Sec. 8, and Const. Okla. Art. XI, Secs. 1-2-3.

effort to turn them over to the exploitation of pipe line companies and oil companies, and to do so is violative of the Declaration of Trust, (by which we mean to include all congressional legislation relating to said land), and infringes the individual vested rights of the lessee in violation of the acts of Congress and the Constitution of the United States under which the lessee claims protection and asserts his rights;¹⁹⁻¹⁵⁻²³ and violates State Stat. March 2, 1909, page 448, Section 1, Appendix "C", and Constitution of Oklahoma, Article XI, Section 1.

Injunction and accounting affords a proper remedy.²² The defendant, Price, has accepted the offer of Congress, occupied these lands, paid the price and vested in himself the preference right by his purchase in 1908-1909. He held this preference right under Enabling Act, and at the adopting of the Constitution, and became thereby vested with the permitted right of purchase²⁹ under the preference right granted by the Enabling Act.³⁰ When legislature passed the Acts of 1907-1908³¹ and 1909,³² it proposed appraisement of 1908 as the basis of sale,²⁸ and within a time fixed "sold" at appraise-

23. S. L. Okla. 1909, p. 452, Sec. 4, Apx. 6

29. Con. of Okla. Art. XI, Sec. 4.

30. Enabl. Act. Sec. 10.

31. Apx. "A".

32. Apx. "C".

ment of 1908. Price has complied with the law and has done all that was required of him, and demanded that the State's officers and agents comply with their part, and give him his title. He has done all things to do, and earned his title.³³

To verify the foregoing recitation, the following brief is addressed.

33. Findings, Rec. 152-157.

Argument.

The general Government entrusted to the State of Oklahoma the administration of this land to provide a fund (Enabling Act, Section 8) for "charitable and penal institutions, and public buildings," and said (Enabling Act, Section 10) that Section 33 may be leased, "under existing rules," (which rules gave a preference right of release, (*Noel v. Barrett*, 18 Okla. 304); and said that when sold, the "preference right" of purchase should be in the lessee. The Congress had, *first*, the right to so say, and *second*, the Government has the supreme judicial power to adjudicate its saying and enforce its command. The State, however, recognized this power (in the Constitution of Oklahoma, Article XI, Section 1), in acceding the "conditions and limitations" imposed in the Enabling Act. By the Constitution of Oklahoma, Article XI, Section 4, the people gave the State Legislature authority to sell the lands "in conformity" with the Enabling Act. This privilege the Legislature exercised by Statute of March 2, 1909, (Appendix "C"), selling Section 33 of the land, and others, or opening them to sale, and fixing the terms, conditions, and times, as therein expressed, upon which lessee might acquire title; and, in Section 3 of the said Statute, enacted "any

lessee, * * * shall have the preference right to purchase one hundred and sixty (160) acres, so leased, at the highest bid, at the time of the sale of the same, as hereinafter provided in this bill." (Appendix "C", Section 3b.)

The "time of the sale," as thereafter provided as to lands not leased "shall be" "immediately upon appraisement"; and was, as to leased lands "upon the expiration of *each* lease contract, or sooner, upon petition of *the* lessee." (Appendix "C", Section 15.)

The appraisement was ordered at the *First* Session of the Oklahoma Legislature, (Session Laws 1907-8) (Appendix "A"). Section 1 of said Statute extended the expired and expiring lease periods, including this one, to January 1, 1909, for return of appraisement of this land which was made January 12, 1909, (Record 98). This land then and there came under this law, (Appendix "C"), and was subject to immediate sale.

To use and apply the language in *Burton v. Traver*, 130 U. S. 232; 32 L. Ed. 920, the State, by this Statute, made the lessee a "promise to sell him his home on those terms, entered into a contract with him on the subject." No fault is found with this legislation, (Appendix "C"). It left no discre-

tion in the Commissioners as executive officers. It was their *duty* to cause appraisal,—which had been done,—and to sell; no excuse for delay, or refusal therefor was invited or countenanced in the Statute. It was the lessee's *right* to have it offered, at once and to take it at high bid, or at appraisal, (Appendix "C", Section 11), if no bid was made; *i. e.* to have the Statute executed. The settler had complied with this law and offered to take it at the district county sale, at appraisal. (Rec. 155, finding 8 and 13, and Record 157, finding 5.) Can the Commissioners defeat his rights, either by mere neglect or purposeful evasion, when he did all required of him, and all that he could do? This Court said "no" in *Lytle v. Arkansas*, 9 How. 333; 13 L. Ed. 153; *Payne v. New Mexico*, 255 U. S. 367, 65 L. Ed. 680.

As said in *Pennoyer v. McConaughy*, 140 U. S. 1; 35 L. Ed. 363, "the transaction, as set forth in the Statute, has all the elements of a contract of sale. The Statute is a formal standing offer by the State of these lands for sale on the terms and at time therein mentioned, etc." *to the lessee*. It effectually excludes any idea that the Commissioners can dispose of it *to others*, or on *other* terms, or for *other* purposes, or prevent its sale as commanded,

or prevent in any way its acquirement in entirety by beneficiary of the Legislation; and any subsequent legislation, or executive action by the State that impaired or destroyed these rights belonging to the lessee under the Enabling Act and this Statute, violated the United States Constitution, Article 1, Section 10.

Pennoyer v. McConnaughy, 140 U. S. 1;
35 L. Ed. 363;

Betts v. Commissioners, 27 Okla. 64.

The leasing of reserved lands began in Governor Steele's time, 1891, (Rec. 129-133), and under the rules prescribed by the Secretary of the Interior, (Rec. 133-134). Congress enacted said rules: Act of May 4, 1894; (28 St. at L. 71.) Such rules gave the lessee a preference right of release that was "property" of value, consideration for a note, and was subject to barter and sale, a right, and a species of title.

Noel v. Barrett, 18 Okla. 304.

It was, in legal effect, an option; and it was held that an optionee, even before election to purchase, had and held an "equitable estate in the optionee."

Clark v. Frazier, 177 Pac. 589, 74 Okla.
—, (Not officially published.)

This was the rule of property before statehood in the territory, (*Noel v. Barrett*) in the light of

which Congress passed the Enabling Act. There being no exclusion or prohibitions in the Enabling Act, that Act carried over the law and rights of its day, in view of which conditions it was adopted. It was so held in many States, and Oklahoma followed. *Trapp v. Cook Construction Co.*, 24 Okla. 850, at p. 855. See *Betts v. Commissioners*, quotation p. 16 post. This was recognized, followed, and confirmed by the Supreme Court of the State in *Clark v. Frazier*, decided after statehood.

~~The~~ rights were transferable, and the transferee stood in the shoes of the transferrer.

Twigg v. State Board, 27 Utah 241, 75 Pac. 729;

Noel v. Barrett, and *Clark v. Frazier*, *supra*.

—and such preference rights, once acquired, cannot be extinguished except by due process of law.

Slusher v. Simpson, 67 S. W. 380; 23 Ky. Law, 252;

Bratton v. Cross, 22 Kan. 674;

Wing v. Dunn, 127 S. W. 1101 (Tex.);

White v. Douglas, 71 Cal. 115, 11 Pac. 860.

The State took the lands in trust—

Errien v. United States, 251 U. S. 41;

Betts v. Commissioners, 27 Okla. 64,

wherein the following expressions occur:

“of such trust funds”, etc. 27 Okla. at page 73, line 29;

“of the State, which is the trustee”, 27 Okla. at page 77, line 12;

“The trustee, which is the State”, 27 Okla. at page 80, line 12,

showing clearly that the State's first adjudication recognized and expressed its trust character, and subject to all the terms, conditions and limitations of the grant. The State granted the Legislature the right to sell said lands, preserving the fund.

Constitution of Oklahoma, Art. XI, Sec. 4.

The State in 1909, by the Legislature, elected to sell said land and fixed all the rules and regulations therefor, saying in mandatory language:

“The Commissioners *shall* dispose of, sell and convey, subject to the limitations, exceptions, conditions, rules and regulations and instructions, as provided in the Enabling Act”, etc. (Appendix “C”, Section 1.)

The Legislature did not regard the State as a patentee with “plenary power”, as asserted by the State and the Magnolia Petroleum Company in motion to dismiss, or it would not have recognized these “limitations, conditions, rules and regulations and instructions” of the Enabling Act.

This Statute (Appendix “C”) did not except this Section 33 from its operation. On the contrary,

it specifically ordered all Sections 33 sold except those "known" mineral lands (Sec. 1). After this legislation, therefore, the Commissioners had but *one* power, and *one* duty—that of selling. They could not thereafter withhold, withdraw, or lease, or alienate, or barter, in any way, except by complete "sale and conveyance", in obedience to the law.

Thomasson v. Upshur Co., 211 S. W. 325,
(Tex.);

Deffenback v. Hawke, 115 U. S. 392, 29
L. Ed. 423;

Davis v. Wichold, 139 U. S. 507, 35 L.
Ed. 238;

Lytle v. Arkansas, 9 How. 315, 13 L. Ed.
938;

neither could they withhold from sale (Appendix "C", Section 1) in violation of, or by violating the Statute, *Lytle v. Ark.* (*supra*). The rule and regulation power was by the Enabling Act vested exclusively in the *Legislature*, not in the Board. It was a power not to be delegated.

Betts v. Commissioners, 27 Okla. 64; 110
Pac. 766;

Haskell v. Haydon, 33 Okla. 518; 126 Pac.
232.

We urge consideration of the decision of the Oklahoma Supreme Court in *Betts v. Commissioners*, 27 Okla. 64, as showing—

First. That it stands decided in this State that the State took this land in trust, with the trust conditions and limitations imposed, and that the Commissioners have no authority save as conferred by Legislature.

Second. That the power to prescribe rules and regulations vested in the Legislature was not to be delegated to the Commissioners. 2nd Syllabus, 5b.

Third. That the regulations of the Secretary of the Interior, promulgated in 1891, had the force and effect of law, and were continued in force in the state by Section 10 of the Enabling Act (27 Okla. p. 65; Syl. 5, and p. 74 line 20).

Fourth. That if these rules had the "force" of law, then the rules of property established by *Noel v. Barrett*, 18 Okla. 304, and *Clark v. Frazier*, 177 Pac. 589; 74 Okla. —, (not published) were confirmed as correct decisions; and the further conclusion follows that the preference rights existing thereunder of lease and re-lease were likewise carried over by the Enabling Act, Sec. 10, (*Trapp v. Cook Con. Co.*, 24 Okla. 850 at 855); and any legislation of the state that would impair those rights would be repugnant to the Act of Congress, and the Constitution of the United States.

Fifth. That if the Enabling Act, Sec. 10, carried over the rules and regulations, and rights attached, into statehood, then the same Enabling Act, Sec. 10, carried into statehood the preference right of purchase granted by the Enabling Act, Sec. 10.

Sixth. That the Legislature of the state, having exclusive power to make rules and regulations, the statute (Apx. "C"), was exclusive and mandatory.

We quote the applicable portions of the opinion from the Betts case for the convenience of the Court :

"the only limitation upon the power of the Legislature relative thereto being that same shall be sold, rented and managed by said commissioners, and that the funds and proceeds derived therefrom shall be under their charge (section 32, art. 6, Const. Okla.), but the *manner* and *terms* of the sale or leasing of such lands shall be subject to the conditions of sections 8, 9 and 10 of the Enabling Act."

"Said section of the Enabling Act clearly permits the public lands by its terms granted to the state to be leased for prescribed periods under such rules and regulations as the Legislature of the state, after the erection of the state government, may prescribe; but, until such time as such rules and regulations may be prescribed by the Legislature after the erection of the state government, such lands are required to be leased under the then existing rules and regulations. The only legislation either by Congress or the Territorial Legislative Assembly

that has been called to our attention or we have been able to find is the following acts: Act May 4, 1894, c. 68, 28 Stat. 71; Act March 3, 1891, c. 543, 26 Stat. 1026; Act March 6, 1899, c. 25, art. 2, p. 196, Sess. Laws Okla. Ter. The act of March 3, 1891, provides that the lands reserved in said territory by said act may be leased for a period not exceeding three years for the benefit of the school fund under regulations to be prescribed by the Secretary of the Interior. The act of May 4, 1894, provides that certain lands reserved therein for educational and building purposes, as well as all the school lands in said territory, may be leased under rules and regulations, thereafter prescribed by the Legislature of said territory, but, until such legislative action, the Governor, Secretary of the Territory, and Superintendent of Public Instruction shall constitute a board for the leasing of said lands under the rules and regulations theretofore prescribed by the Secretary of the Interior, for the respective purposes for which the said reservations were made, except that it shall not be necessary to submit said leases to the Secretary of the Interior for his approval."

"by the terms of section 10 of the Enabling Act, the rules and regulations existing relative to the leasing of said lands were continued in force in the state until the Legislature of the state prescribed rules and regulations for the leasing of the same. Rules and regulations for the leasing of said lands simply mean the laws enacted for the leasing of same and the rules promulgated by the Secretary of the Interior which had the force of law to govern as to the leasing of such lands."

"and we are constrained to hold that, under the terms of the Enabling Act, the existing rules

and regulations relative to the leasing of said lands were continued in force in the state until the Legislature prescribed rules and regulations”

“The Commissioners of the Land Office, by virtue of section 32 of article 6, ‘have charge of the sale, rental, disposal and management of the school lands and other public lands of the state and of the funds and proceeds under the rules and regulations prescribed by the Legislature.’ This board has *no power to act* other than under rules and regulations existing under the Territory of Oklahoma continued in force by virtue of section 10 of the Enabling Act, or by rules and regulations as prescribed by the Legislature of the state.” (Italics ours.)

Section 9 of article 9 of the Constitution of the State of Colorado provides:

“The Governor, Superintendent of Public Instruction, Secretary of State and Attorney General shall constitute the state board of land commissioners, who shall have the direction, control and disposition of the public lands of the state, under such regulations as may be prescribed by law.”

“If as contended in this case, the state board has the power to lease the state lands in such manner as will, in its judgment, secure the maximum amount therefor, without regard to the statute, then the provision reserving the right to the Legislature to prescribe regulations is not effective for any purpose. It would be useless to prescribe regulations, if such regulations might be ignored whenever, in the judgment of the board, a greater revenue might be secured to the state by adopting a course in

conflict with the statute. Such a construction would place in the state board plenary power over the state lands. Instead of leasing them for twenty years, as now proposed, one board might lease all the state lands for a period of ninety-nine years, and subsequent boards would, in effect, be stripped of all power."

(This portion of this decision is directly violated by the alleged oil lease (Rec. 14) which run for "5 years" and as long, etc. as oil or gas or either, "is found in paying quantities" which is capable of indefinite duration, post p. 19. Hence this Board undertook, as to mineral lands, to lease, maybe for perpetuity, and thus foreclose future Boards and violate the 5 year limitation placed in Enabling Act, Sec. 8.)

"Section 32, art. 6, supra, has the effect of placing the control of the sale, renting and managing of the school lands and other public lands of the state and of the funds and proceeds derived therefrom in the hands of the Commissioners of the Land Office, but with the limitation that they shall act only under rules and regulations prescribed by the Legislature.

"The title to the land is in the state, and the board is merely a governmental agency of the state, which is trustee."

City of Chicago v. People ex rel Miller,
80 Ill. 384;

Jernigan, Treas. v. Finley, Comptroller,
90 Tex. 206, 38 S. W. 24;

Knorr County v. Humoll, 110 Mo. 67; 19
S. W. 628.

"The provisions of this act of May 4, 1894, provide that all the expenses and costs of the leasing of said lands shall be paid out of the

rentals. There was no constitutional provision at that time providing that an appropriation should be effective only for a certain, definite time after its enactment, or that it must specify the sum certain. It was a valid, continuing appropriation as it existed under the laws of the Territory of Oklahoma, and if, by the terms of section 10 of the Enabling Act, it was brought over and kept in force in the state until the Legislature of the state prescribed rules and regulations, it is still a valid, continuing appropriation until the Legislature acts."

"In passing, it may be well to state that there is a serious question as to whether section 20 of said act, providing that 'the commissioners of the land office may make such other and further rules and regulations governing the public lands of this state as not in conflict herewith,' is valid, in that it confers legislative power on said commissioners which is vested within the Legislature, and not subject to be delegated. The case of *State ex rel Rush v. Budge et al.*, *State Capitol Com'rs*, *supra*, seems to conclusively settle that point."—from Betts case.

Such being the rights and privileges and immunities of the lessee, no subsequent legislation could avoid, impair, take, or deny the right granted.

Dartmouth College case;

State v. McPeake, 47 N. W. 691;

State v. Thayer, 64 N. W. 700;

Wing v. Dunn, 127 S. W. 1101;

State v. Buttsville Bank, 144 N. W. 105;

Pennoyer v. McConaughy, 140 U. S. 1.

The lease of this land for oil and gas purposes is an "alienation", and a conveyance of the minerals, and the use of the land.

Eldred v. Okmulgee, 22 Okla. 742;
Hoyt v. Fixico, 175 Pac. 517 (Okla.).

Following and citing Federal authorities:

U. S. v. Noble, 237 U. S. 74; 59 L. Ed. 844;
Guffey v. Smith, 237 U. S. 101;
Southern Oil Co. v. Colquitt, 28 Tex. Civ. App. 292, 69 S. W. 169.

This "lease" to the Magnolia is, if anything, capable of indefinite duration, in perpetuity, and a *grant in place*. It reads:

"does hereby demise, grant, lease and let * * for the term of five years * * and as long thereafter as oil or gas, or either of them, is produced in paying quantities, all the oil *deposits*, and natural gas *in or under* * * * described tract," etc. "It conveys the substances named themselves in the ground"

Texas Co. v. Dougherty, 107 Tex. 226;
176 S. W. 717;
Guffey v. Smith, 237 U. S. 101.

Correspondingly, since a lease, or grant in place, whichever it is, such as the Magnolia Petroleum Company relies upon, is an alienation of part of the land or estate, we assert that if the Enabling Act gives to the lessee, who takes and improves the land, any "option" or "preference right" to purchase the land sometime, such option or right extends to all the land and its contents, oil, gas and water, and the taking away of these parts, and of its possession

without lessee's consent, is a deprivation of property or right, claimed under Act of Congress, in violation of the Constitution of the United States.

In *Ohio Oil Co. v. Indiana*, 177 U. S. 190, 44 L. Ed. 729, this Court said:

“The right to oil and gas beneath his land is an exclusive and private property right in the land owner * * * of which he may not be deprived without taking of private property,”

also we cite *Thornton Oil & Gas*, Sections 19 and 20; *Gould on Waters*, Section 291; *Gruner v. Hicks*, 230 Ill. 536; 82 N. E. 888; *People v. Bell*, 237 Ill. 332, 86 N. E. 593.

Therefore, if any right to, or claim upon this land was given the lessee, Price, by the Enabling Act, it extended to the oil and gas therein and thereunder, and the State could not, by legislation or Commissioners by authority exercised under the State, take it away except by violating the Constitution of the United States.

In this view, we assert also, that neither the State nor its officers could take this interest and right away from Price and give it to the Magnolia Petroleum Company because to do so is taking private property for *private* use and is forbidden by law and in the Constitution of Oklahoma it is for-

bidden. It is a denial of due process of law guaranteed by the Constitution of the United States.

Nichols on Eminent Domain, Vol. 1, p. 114;

Oklahoma Constitution, Art. II, Sec. 23;
Constitution of U. S., Amendment V.

The "lease" or "grant" to the Magnolia, subsequent to the Sale Statute (Appendix "C") also carried the right of exclusive possession of such part of the land as the Magnolia saw fit to take, which it exercised and did take and destroyed Price's occupancy, use, fences, orchard, water and property of several kinds. This violated Price's right of peaceful possession granted by his lease, his right of use, and right of property, and being capable of extension to cover all the land, and capable of indefinite duration to cover all time, or at least, or most, all of Price's allotment of time, was an unconstitutional invasion of his right granted by the Enabling Act and the Statutes of the State. (Appendix "C".)

Guffey v. Smith, 237 U. S. 101, and cases above cited, p. 76.

In approaching the consideration of this question, of what the Enabling Act gave to the lessee of the involved land, certain established principles occur to us.

The first is to ascertain what object Congress intended and attempted to accomplish by the "preference right" granted by Section 10. The language occurs in no other Enabling Act which we have found. It was not put in inadvertently or accidentally. Prior to the passage of the Enabling Act, the reserved public lands of Oklahoma had reached considerable proportions, four sections from every township, or one-ninth of the area of the former Oklahoma Territory, or, according to House Committee's report No., 3,128,362 acres, or 19,514 quarter sections, about equalling five thousand square miles, and nearly that many families.

The lessees had reclaimed this raw land, built homes, farms, fences, barns, orchards, wells, drainage and irrigation ditches, roads, churches and schools. Their land was "appraised" periodically and they paid four per centum (4%) of the appraisal annually—practically a four per cent annual tax on the land, and the same local tax on improvements and personalty as their neighbors paid on their property. They paid from two to four times as much "land tax" as was paid by the homesteader after acquiring the fee. The homesteader had either five or seven years before final proof, in which

he had exemption from land tax. The lessee had no such exemption. He paid from the opening shot. The lessees were a considerable political factor in the Territory, as they had about 16,000 votes, and each always had some persuadable friends; he had the School Land Lessees Association; he had weight. The Secretary of the Interior, in 1891, had established certain rules giving preference right of release, (Rec. 133). They were enacted by Congress May 4, 1894, 28 Stat. at L. 71; the right was confirmed by the courts as a title and valuable property right,—a sellable right—before statehood.

Noel v. Barrett, 18 Okla. 309, *supra*.

It was held an option after statehood in *Clark v. Frazier*, 177 Pac. 589; 74 Okla. —(not reported).

In this status, with statehood imminent, Oklahoma Territory's delegate in Congress, Hon. Dennis Flynn, asked Congress to secure to the lessees the preference right of lease and re-lease which they then had under former legislation, and the preference right of purchase when the state elected to sell. This Congress did, to its great credit, and consistent with its former policy toward the pioneer. (Section 10); post p.—.

The lessee accepted it at face, as did the First Legislature of the State, as manifested by the ap-

praisal Statute (Appendix "A") and by the Sales Statute (Appendix "C"), but the oil idea fastened its tentacles upon the public land and the desire for greater gain on the part of the State, and others, induced a disregard of the preference rights extended by the Enabling Act to the lessee, who had reclaimed the wild land. The oil idea secured the passage of the "deeming" Statute (Appendix "B"). The acquiring of oil rights in public lands, or at least a pretense thereof, seems exceedingly easy. There are so many rich arguments about so enriching the public coffer that it seems irresistible to the man temporarily in public office; but Congress in 1906, looked to the patient pioneer who had spent twenty-seven years improving these lands, and whose tax for schools had supported them in the beginning and been continually increased, as he had increased its value.

Congress intended to protect this settler in his land possession or it would not have inserted this preference right clause. It could have left it out. If it only means, and effects, what the Oklahoma Supreme Court said it meant, and effected, "nothing", then it could, and should have been left out. Our Supreme Court treated the Enabling Act exactly as if it had been left out. The Magnolia's

counsel asserts that, under the Enabling Act, the Legislature had "plenary power" over this land; that can be true only if this "preference right" clause had been left out, or is adjudicated "out".

Congress did not leave it out.—Our Legislature in Appendix "B", and our State Supreme Court in this case, only, did. We now ask that its presence in the Act of Congress be enforced by this Court.

In a contest between a settler and his opponent, this Court has always said the legislation was to be construed favorably to the settler.

Clement v. Warner, 24 How. 394; 397;
16 L. Ed. 675, 696;

Bohall v. Dilla, 114 U. S. 47, 51; 29 L.
Ed. 61, 63;

Moss v. Dorman, 176 U. S. 413; 44 L. Ed.
526,

A public grant of lands is a contract and is protected by the Constitution of the United States.

Fletcher v. Peck, 6 Cranch 87, 137;

Green v. Biddle, 8 Wheat 1; 5 L. Ed. 547;

Cooley, Con. Lin. 328, note p. 330.

The grant of a right, privilege or immunity is likewise protected.

Dartmouth College Case, 4 Wheat, 518.

A grant of public lands that are free and clear is a grant *in presenti*.

Lake Superior Construction Co. v. Cunningham, 155 U. S. 354; 39 L. Ed. 183.

A grant, therefore, to the State, in trust, of lands encumbered by lessees holding an estate capable of sale and enforcement already acquired under Act of Congress (28 St. at L. 71), and already adjudicated and established by the Court (*Noel v. Barrett*, 18 Okla. 304); and holding pursuant to, and in execution and furtherance of the purpose of the trust; and who are recognized in the Act of Grant, and whose rights are recognized, preserved and extended by the Act of Grantee (Constitution of Oklahoma, Article XI, Section 1), cannot justifiably be said to have passed to the grantee State with "plenary power" in the State, to override these rights, and one of the very purposes of the Act, and all the very beneficiaries, who could be the only occasion of putting the "restrictions, limitations, and conditions" in the Enabling Act.

The State saw and recognized this, and specifically enumerated its restrictions in its acceptance (Oklahoma Constitution, Article XI, Section 1), and Statute, Appendix "C", Section 1.

"It is not important to inquire as to the power of Congress to pass this law * * as the assent of the people through this convention * * * must be regarded as binding the State."

Minn. v. Batchelder, 68 U. S., 551, 1 Wall 109.

The Oklahoma Constitution, Article XI, Sec. 1, expressly enumerates the conditions on the public lands "under the provisions of the Enabling Act and any other Act of Congress," (which includes the Act of 1894, giving the lessee a preference right under the rules adopted, 28 St. at L. 71); and the "faith of State" was pledged to this observance by said Section 1; and the sale was authorized only "in conformity with the Enabling Act." (Oklahoma Constitution, Article XI, Section 4.)

We think the decision of the Oklahoma Supreme Court in this case violates that pledge of faith in Section 1, and defeats the "conformity" required by Section 4.

This grant by the Enabling Act, seems to be on condition subsequent to the Government which the Government has the right and power to enforce.

Errien v. U. S., 251 U. S. 41;
State v. McMillan, 12 N. D. 280; 96 N. W. 310;
School District v. State, 213 S. W. 961 (Ark.);
Green v. Robinson, 109 Tex. 369, 210 S. W. 498.

The known conditions at the time of the grant (Enabling Act 1906) governs and controls the

grant, (*Trapp v. Cook Construction Co.*, 24 Okla. 850); and if the Enabling Act granted the lessee any right, privilege or immunity, he being then and there in possession as lessee, and holding the congressionally granted preference right of lease and re-lease, had then and there the "capacity to receive it," and did receive it, (*Vincennes v. Indiana*, 14 How. 268; 14 L. Ed. 416); no subsequent legislation could change it (*Dartmouth College Case*), and no subsequent discovery of condition of oil, gas or water, or other mineral could, after his right attached, affect his prior right in existence.

- Wyoming v. United States*, 255 U. S. 489;
65 L. Ed. 742;
Deffenback v. Hawke, 115 U. S. 393; 29
L. Ed. 423;
Davis v. Wiebold, 139 U. S. 507; 35 L.
Ed. 238;
Dorer v. Richards, 151 U. S. 658; 38 L.
Ed. 305;
Shaw v. Kellogg, 170 U. S. 312; 42 L. Ed.
1053;
United States v. Silver Mining Co., 128
U. S. 673; 32 L. Ed. 571;
Burke v. Southern Pacific R. Co., 234 U.
S. 699; 58 L. Ed. 1527;
*Colorado Coal & Iron Co. v. United
States*, 123 U. S. 307; 31 L. Ed. 182;
Green v. Robinson, 109 Tex. 367, 210 S.
W. 498;
Saunders v. La Purisima Gold Min., 125
Cal. 159; 57 Pac. 656;
No. 3 Land Letters, Sep. 26, O. L. 8-03,
5308-6417;

Ind. Div. 7006, 1901, Dept. Int. by Van Deventer, (now Justice), approved October 28th, 1901.

In the *Minn. v. Batchelder* case, 1 Wall, 109; 17 L. Ed. 551, Congress, in the Enabling Act of Minnesota, granted certain reserved lands to Minnesota; but before the acceptance thereof, Congress, by joint resolution, made the land subject to preemption to those *then* within the preemption act. It was held valid and enforced by this Court ahead of the States claim of title. It seems clear, therefore, that the preference right of lease and re-lease, established by the Act of 1894 (28 St. at L. 71) was carried over, and of purchase, established by the Enabling Act of Oklahoma to those who brought themselves within the provisions as a lessee, was ahead of the State and could not be subsequently affected. This decision was in 1864, so must be taken as known to Congress, the Oklahoma Constitutional Convention, and the Oklahoma Legislature. If such is the case, the doctrine of the Trapp case, and *Pennoyer v. McConnaughy*, 140 U. S. 1, surely applies.

We take it further that the Sales Act of Oklahoma, 1909 (Appendix "C"), exactly meets the conditions of the law considered in the *Pennoyer* case, *supra*, and that

“The Statute (Appendix “C”) was a formal standing offer by the State of these lands for sale, on the terms therein mentioned, and an invitation to all qualified citizens of the United States (lessees) to become purchasers, etc.”

That the relation of lessee assumed thereunder, or continued thereunder, was an acceptance and

“thenceforth there was an agreement * * binding on each of them until released therefrom, etc.”

—exactly as expressed in the Pennoyer Case.

Forced Sale.

We want it distinctly understood that this is not an action by Price to force or compel the State to sell this land, as continually reiterated by counsel for Magnolia and the State, and used as a refuge by the Supreme Court of Oklahoma in its opinion.

We want to be clearly understood as asserting that we consider—

(1) That the Enabling Act gave permission to the State to sell if the State so elected.

(2) That the Constitution of Oklahoma, Article XI, Section 4, gave such permission to the Legislature.

(3) That the Legislature by the Sale Statute of 1909 (Appendix “C”), elected to sell, fixed all

the terms and conditions, time, and manner, of sale and of acquisition, and left nothing to negotiation or alteration by the Commissioners, and enacted that the Commissioners "shall sell" under those terms. That it was "mandatory."

(4) That the defendant, Price, lessee, accepted such Statute, demanded his land at the auction, at his Court House, when all there was offered, and there being no other bidders, offered to take it at the appraised value on the terms fixed by the Statute (Appendix "C"). (Record 154-155, finding of fact, 9, and 8.) He did all he could do.

(5) That thereby, in legal effect a sale was consummated and the equitable estate passed, Price having done all the law imposed upon him, and the Commissioners having no option or discretion in the matter, and no power of refusal. (Rec. 157, finding 5.) Authorities post, p. ~~8~~97

The Trial Court so found (Rec. 154-5 findings 7 to 13) and ordered an accounting between him and the State, and between him and the Magnolia Petroleum Company. (Rec. 158.)

The Supreme Court of Oklahoma *did not* disturb these findings of fact at all, and reversed the decree on the theory only that Price had no preference right in or to the land.

Complete oil development of a piece of land brooks no interference, and renders the land valueless for all other purposes and for all time, except such small salvage as might be from removed improvements.

The State and the Magnolia Petroleum Company argue, and the Supreme Court opinion argues that if no sale was decided upon and made by the State, as Trustee, then no preference right would exist in, or at least be available to a lessee; this ignores, we think, Apx. "C"; that there having been no sale (as they claim) that no preference right of purchase exists in Price, the lessee; that, therefore, no preference right yet being *in esse*, no claim of it can be urged or sustained; that their right to divide the land, take the contents, and destroy its surface, devastate Price's occupancy, his products, improvements, labor and hope, anticipated the existence of his right, and, therefore was free and untrammelled by the Enabling Act. This they did with a completeness impossible to exaggerate or magnify; but it is not made clear just what benefit this preference right, given to the lessee by the Enabling Act, would have if postponed in its existence until a "sale" of the land or after the "sale", or destruction. What value would there then be to a preference right to

buy what is left? Or what might be left, in a more or less complete state of destruction, attendant upon oil development, or other circumstances, such as sand pit, rock quarry, or water extraction, the relict of which is slush pits, salt water, excavations, saturation of soil with oil and salt water, alkali water, and other substances poisonous to life and vegetable growth; with pipe lines from oil and gas escape; anchors and obstructions; tanks and storage excavations and sites; timber denudation and water appropriation, and exhaustion. If the State Statute can authorize severance and sale separately of the water, or oil, or gas, it can "segregate" or sever sand, silica, gypsum, stone, granite, asphalt, zinc, lead, or any or all known minerals, or things and sell them, or "lease" them one by one, or all together as from time to time pleased the vagaries or satisfied the speculative ambitions of the exploiters, the Legislature, the Commissioners or other executives. What then, would the preference right to purchase be worth? Nothing, of course. That argument is equivalent to denying any effect to the preference right clause, because the right to take part of the land would ultimately lead to the right to take all, and leave nothing for the preference right clause to attach; and, as all of these constituents of land in Oklahoma would thus be sold

and removed, either one by one or all together, would the "lessee" have the preference right to buy each, every, all, or singular, or, as the Magnolia contended, must he sit helplessly on his farm and await what the fates send, or leave? If so, the "preference right to purchase" means nothing, and Congress did a useless and heartless thing in inserting it; or again: Just what avail would a preference right to purchase be after a "sale" had been had? In operating for oil, the surface is destroyed for all other purposes; then, where operations performed, is that land then yet "unsold"? If so, when can it be "sold", and to what would the preference right of purchase attach? And what its value?

If, on the other hand, the State may alienate the oil, gas, water, sand, stone, or other elements, on the theory that no preference right, under the Enabling Act attaches to the land, where is the sound basis for this, their theory that the preference right attaches to what is left? If it attaches to the rind, as this State urges, it ought also to attach to the meat, and if it attaches, as the State urges, after a "sale", it must also attach as a right capable of being protected before sale, else there might be nothing left to sell, and, therefore, the lessee derives no benefit. Congress is not complimented by such an argument on the construction of its Enabling Act.

Where the terms of a statute are plain the courts are not at liberty to go outside to hunt for a meaning which may be imagined to have been the intent of Congress.

U. S. v. The Sadie, 41 Fed. 396;
U. S. v. Railroad Co., 91 U. S. 72.

It was urged by the plaintiffs that the Commissioners had refused to "offer" said land, at said time, at said Court House, and that there was, and could be no sale, and that this defendant's answer is to compel a sale. This theory necessarily presupposes—

(1) That the Commissioners, by refusing to "offer" at the Court House auction, could defeat the command of the Legislature that they "shall sell," and that the Lessee might buy.

(2) That, therefore, the Commissioners are superior in power to the law.

(3) That being so as to one quarter section in the county, then they could be as to any or all in the county, and it follows all in the state. Thus the Sale Statute be completely defeated.

(4) That the Commissioners, having elected, as to this quarter, or all quarters, to not sell in obedience to the law, they cannot be compelled to sell, and are, therefore, superior to the law.

(5) That being above the law of Oklahoma (Apx. "C") they, therefore, and consequently, are above the law of Congress, the Enabling Act; and can lease the land to an oil and pipe line company, for a time "capable of indefinite duration," notwithstanding the preference granted to lessee, and not withstanding the mandatory terms of the Enabling Act and the Sales Statute (Apx. "C"), which has never been repealed.

(6) It was, and may be urged, that the "preference right" was a valueless thing, as that no sale might ever take place, and that until it did, no one had a right to look to it.

This is a queer practice, in view of the laws we have cited (Enabling Act; Constitution of Oklahoma, Art. XI, Sec. 4; Sales Law, Apx. "C") as the idea, also presupposes the Commissioners to be superior to the law, and to override Apx. "C"; also overlooks the law of Oklahoma, May 26, 1908, Chapter 49, Article III,

"Sec. 21. All preference rights, vested rights and equities, shall be inherent rights."

This preference right and equities being established by the Enabling Act were by the state made to "inhere" either in the lessee, or the land, or both. It is equivalent to saying that the doctrine of *Noel v. Barrett*, 18 Okla. 304, and *Clark v. Frazier*, 177

p. 589, —, (Okla.) —(not published) is fixed—*in-heres*. These opinions, and the principles thereby established were by the state Supreme Court in this case overlooked, or at least not given effect. The theory that one, holding preference right of purchase, or option, cannot enforce his right until after he or some one else buys, is a doctrine to which we cannot assent. That course of action, and policy, pursued by the Commissioners, not only would result in Price being deprived of the opportunity to acquire a legal title to his lands, but it set at defiance his rights even to acquire such lands in their entirety, by disregarding with impunity the Enabling Act and sales statute. Leasing the lands for oil and gas if allowed took from the land its most valuable components, the contents, and the right of use, and possession. Merely to have disregarded the land and to have withheld the land from sale, for a time, would have only postponed the full enjoyment therein by Price. While this would have been we think, a clear invasion of his right, it is not comparable with what was actually done: the leasing of the land by the Commissioners, for oil and gas and the taking therefrom of all that, which made it valuable, both its integrity and its possession and use.

The findings Rec. 152—*et sequitur*, being undisturbed are accepted by this Court.

Myers v. Heltinger, 94 Fed. 370.

There are cases from this Court which we think justifiably leads us to hope that their position is not so absolute as asserted.

First: Equity looks upon that which ought to be done, or ought to have been done, as done; and for the purpose of reaching justice will consider that parties have performed duties which they ought, under the law, to fulfill, and when it interposes to compel the performance of an act which has been contracted to be performed, it treats it as performed at the time due.

Dunn v. Yakish, 10 Okla. 388, 61 Pac. 926;

Speicher v. Lacy, 28 Okla. 541, 115 Pac. 271; 35 L. R. A. (N. S.) 1066;

Fouts v. Fondray, 31 Okla. 221; 120 Pac. 960; 30 A. & E. Ann. Cas. 301;

Carter v. Sapulpa Ry. Co., 49 Okla. 471; 153 Pac. 583.

It should, therefore, be considered that the sale law (Apx. "C"), having commanded the advertisement and offering of this land at the Stephens County sale on January 11, 1911, (Rec. 117), it was so done; that the Court, having found (Rec. 154, finding 7) that the Commissioners "wrongfully failed and neglected to sell said land, as required by them by law," which finding was and is unchallenged,

undisturbed and unreversed, it must be taken in Equity that it was done; that the Court, having found (Rec. 155, finding 8) that the defendant, Price, "was, ready, able and willing to comply with all the provisions of the law, which included the taking at the high bid, or appraisal, "and did demand * * that same (land) be sold" (which finding was unchallenged and remains undisturbed) put defendant, Price, in a position where the rule is that his rights cannot be prejudiced by the failure of the state's officers to do their sworn duty, and commit a felony in so doing.—Apx. "C", Sec. 17.

"Price's rights cannot be prejudiced, much less destroyed, by the neglect or failure of the School Land Commissioners to perform their duty."

Shepley v. Cowan, 91 U. S. 330, 23 L. Ed. 424;

Lytle v. Arkansas, 9 How. 315, 13 L. Ed. 938, as reviewed and distinguished from *Frisbie v. Whitley*, 9 Wall, 187, 19 L. Ed. 668;

Ard v. Brandon, 156 U. S. 537, 39 L. Ed. 524;

Tarpey v. Madsen, 178 U. S. 215, 44 L. Ed. 1042;

Nelson v. Northern Pac. R. Co., 188 U. S. 108, 47 L. Ed. 406;

Payne v. New Mexico, 235 U. S. 367; 63 L. Ed. 680.

"The rule applicable in the present case, so analogous to the familiar doctrine so often announced

by this Court that 'a person who complies with all the requisites to entitle him to a patent for a particular lot or tract of land, that has been opened for sale, is to be regarded as the equitable owner thereof,' and the land is no longer open to location, or other disposition. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void."

Lytle v. Arkansas, 9 How. 314, 333, 13 L. Ed. 153;

Stark v. Starr, 6 Wall. 402, 417, 18 L. Ed. 925;

Witt v. Branson, 98 U. S. 118, 25 L. Ed. 86;

Witherspoon v. Duncan, 71 U. S. 210, 218, 18 L. Ed. 339, 342;

Deffenback v. Hawke, 115 U. S. 392, 29 L. Ed. 423;

Benson Min. & S. Co. v. Alta Min. Co., 145 U. S. 428, 36 L. Ed. 762;

St. Paul & S. C. R. Co. v. Winona & St. P. R. Co., 112 U. S. 720, 28 L. Ed. 872;

Payne v. Central Pac. R. Co., 255 U. S. 228, 65 L. Ed. 598;

Payne v. New Mexico, 255 U. S. 367, 65 L. Ed. 680;

Wyoming v. United States, 255 U. S. 489, 65 L. Ed. 742.

"The state stands in no different relation as a suitor than any individual. When the state comes into court to submit to judicial determination, it is not acting in its capacity as a sovereign, but as a litigant, claiming the same rights and bound by the

same rules as any of its citizens under similar circumstances."

- Lynch v. United States*, 13 Okla. 142, 73 Pac. 1097;
United States v. Bank, 15 Pet. 377;
Brent v. Bank of Washington, 35 U. S. 596;
United States v. Hughes, 11 How. 552;
United States v. Throckmorton, 98 U. S. 61;
United States v. Miner, 114 U. S. 223;
Folk v. United States, 233 U. S. 177, 147 C. C. A. 183;
United States v. Wynona & St. P. R. Co., 67 Fed. 948, 15 C. C. A. 108;
United States v. Northern Pac. R. Co., 95 Fed. 864; 37 C. C. A. 290;
United States v. Detroit Timber & Lbr. Co., 131 Fed. 668, 67 C. C. A. 1, 11. Affmd. in 200 U. S. 321, 56 L. Ed. 499;
United States v. Midway Northern Oil Co., 232 Fed. 631.

"The Commissioners of the Land Office were not principals, but mere agents of the law, hence they were without power to withhold from sale lands which were by law (of 1909) preemptorily ordered to sell."

- Lytle v. Arkansas*, 9 How. 315, 13 L. Ed. 938;
Deffenback v. Hawke, 115 U. S. 392, 29 L. Ed. 423;
Davis v. Wiebold, 139 U. S. 507, 35 L. Ed. 238;
Shaw v. Kellog, 170 U. S. 312, 42 L. Ed. 1050;
Burke v. Southern Pac. R. Co., 234 U. S. 1152, 1156.

On Constitutionality of Appendix "B".

We cannot refrain from touching on the constitutionality of the "deem" law (Appendix "B") from another point of view. It assumes that the Board may proceed by declaration, mere *fiat*, or expression of its opinion, or maybe desire, or neither; as in this case: "whereas, we have had offers * * * to place oil and gas bids", it may proceed on mere cupidity or interest, to "declare valuable for mineral purposes, and that same be segregated and withheld from sale." (Rec. 80, Ex. "C", August, 1915.) Thus without knowledge, information, evidence, notice to lessee, or hearing, the statute, or authority, assumes to give the power to the Board to "deem" one piece different from all others, and without the law, or all different from what the law contemplated, and all without the law. If Price, lessee, took anything by the Enabling Act, or Appendix "C", by virtue of his bringing himself within the terms of the Enabling Act, or Appendix "C", as lessee, then this "deeming" would take it away from him, if upheld. This, we think, would be deprivation of property without due process of law, and of equal protection, because his preference right, as lessee, dated from, and vested in 1902, at the first

lease. Such deeming in 1915 would deprive of this vested interest adjudged in *Noel v. Barrett*, 18 Okla. 304, and *Clark v. Frazier*, 177 Pac. 589 (Okla.). Also of his preference right of purchase that vested with the Enabling Act.

This "deem" statute, likewise vests, or attempts to vest legislative power in the Commissioners to set aside all laws, and to usurp the legislative function of declaring what shall be sold and what not, and when, and the manner, and to usurp the power exclusively vested in the Legislature by the Enabling Act and the State Constitution, Article XI, Section 4, to fix the regulations of sale. This is unconstitutional and void.

Belts v. Commissioners, 27 Okla. 64, 110
Pac. 766;

Haskell v. Haydon, 33 Okla. 318; 126
Pac. 232.

Then either the Statute is void, or the authority of the Commissioners so exercised under the State is void as repugnant to the Enabling Act and the Constitution of Oklahoma and the United States.

This Statute likewise, in itself, attempts to invest the Commissioners with power to avoid, or escape, past conditions. If the rule expressed in *Shaw v. Kellogg*, 170 U. S. 312; 42 L. Ed. 1050, and

in *Work, Sec'y v. U. S.*, No. 258 in this court, decided May 28th, 1923, is law, then if the preference rights granted by the Enabling Act must be given effect, the defendant, Price, lessee, had his rights attached at that time, (1906) and in the conditions then known. If this be true, then no subsequent "deeming" or declaration, or resolution, could supplant the right or withdraw the land from its subjection.

United States v. Iron, Silver Mining Company, 128 U. S. 673;
Wyoming v. United States, 255 U. S. 489;
Deffenback v. Hawke, 115 U. S. 393;
Davis v. Wiebold, 139 U. S. 507;
Work v. United States, hereinafter considered.

In the Wyoming case, this Court said:

"The validity of the selection should be determined as of the time when it is made, that is, according to the conditions then existing," to-wit: 1906, or 1909, when Price purchased his right.

Therefore, the validity of Price's right should be determined as of the time of his selection "according to the conditions then existing." Now the "time of selection," under our Enabling Act, would seem to be as to those who were then lessees, as the date of the Enabling Act; as to those subsequently selecting, as of the date they did so. Price con-

tracted to buy out a previous lessee in 1908, *after* the Enabling Act passed in 1906, and in reliance thereon, and in reliance on his predecessor's rights, initiated in 1902, and paid out and took assignment in 1909 (after passage of sales statute 1909,) with the approval of the Commissioners; the State, by Constitution Article XI, Section 1, its acceptance, and by the Sales Act, (Appendix "C", 1909) confirmed his expectations, and his right.

It would not seem right then that any subsequent Commissioners' "deeming" the land valuable for oil (made in 1915) or any subsequent discovery of oil in 1920, could avoid his rights or change the "conditions then existing," under which he took.

Green v. Robinson, 109 Tex. 367, 210 S. W. 498.

The "deem" Act, (Appendix "B") is repugnant to the Enabling Act (and the Constitution of Oklahoma, Article XI, Section 4, also) because the Enabling Act (and Oklahoma Constitution) only permit the land to be "sold", not leased. The power to sell does not include the power to lease for mineral purposes, to barter, to trade, or do otherwise than "sell".

Thomason v. Upshur Co., 211 S. W. 325; (Tex.)

Dallas Co. v. The Club Co., 66 S. W. 294;
95 Tex. 200, and cases cited therein;
Pulliam v. Runnells Co., 79 Tex. 363, 15
S. W. 277.

This alleged Magnolia lease and Statute (Appendix "B") is an attempted conveyance of a "part" of the land "for a division of the proceeds other than money" and the easement, use and permission to destroy the land, for no consideration; strictly as condemned by the Court in the Thomason case, the Dallas Company case, the Green case, *supra*. Such power is not in the Legislature. That a lease is an "alienation" was early held by Oklahoma in *Eldred v. Okmulgee*, 22 Okla. 742, as already cited.

On the Theory that Lessee held by Fee Farm, Rent.

There is another view of the Lessee's rights, founded in ancient law, that adds to the specific right granted by the Enabling Act and the Sales Statute, and which lead the Congress, we think, to its effort to expressly protect the lessee.

The Rules and Regulations promulgated (Rec. 134, Rule 8) were held in *Noel v. Barrett*, 18 Okla. 304, adjudged in territorial times, to give the lessee Barrett a perpetual right of re-lease; the court said "Barrett leased the land out of which the con-

troversy grew, and under the rules and regulations of the Department he, so long as he kept the rentals paid, was the possessor of a preference right to continue leasehold upon such terms as the board should from time to time impose. This preference right is a valuable property "right," etc. etc. was "subject of sale and purchase same as titles to other lands" (at p. 306). Now this being adjudged and settled and a rule of property in the Territory and State, there was no right of reverter in the lessor. Lessee's obligation was not under this law to turn back the land, but he could hold it as long as he complied with his contract of payment of rentals, which were to be and were fixed by law, and were fixed at 4% on appraisal, and that only, and not the term, was subject of change.

These rules were enacted as a part of the act of May 4, 1894, 28 St. at L. 71 (quoted in record 176) and had the force and effect of law; so held in *Betts v. Commissioners*, 27 Okla. 64 (at p. 73). The evident purpose and legal effect, was to give and secure to the lessee a permanent home, conditional only on his keeping up his rental, the expected income to the funds.

This condition of the law, and status of the lessee, was carried over by the Enabling Act, and the

Constitution of the State, under the rule in *Trapp v. Cook Construction Co.*, 24 Okla. 850, *supra*, and indeed no effort has been made to change it, except by the "deem" Statute, Apx. "B".

The rate of rental was re-enacted at 4% in Statute of 1909, Ch. 28, which reads, in Sec. 11, "The rental price for said land shall be fixed at four (4) per centum * * * on value * * * as returned by appraiser of the year 1908." It then provided for re-appraisal each 5th and 10th year, but left no condition of future change of rate. So to all intents both elements were fixed; and the lessee had a permanent contract of tenure, with right of re-entry only for default by lessee by non-payment, waste, etc. But this was not reversion, in the meaning of the law. It seems to be considered that such a grant is "an executory devise or a dedication of property to a public use."

Vincennes v. Indiana, 14 How. 268.

This does not carry right of re-version in the United States but the right of recovery of an income to the use of the fund to which the income was dedicated, in this case "charity and public buildings, and penal institutions".

The lessee, having an estate subject of bargain and sale had a descendible interest and inheritable estate.

The leading case we think, on this subject is, *De Peyster v. Michael*, 57 Am. Dec. 470, (6 N. Y. (2 Selden) 467) where, in Am. Dec., a full and able discussion is found with note of extensive use following; therein is distinguished "re-entry for non-payment" and "reversion". "Re-entry" being "mere right or *chose in action*" causing "forfeiture" and not a "reverter" and it is stated that where "property is held on condition all the attributes and incidents of absolute property belong to it until condition is broken". Here then the lessee had a "Fee" or absolute right of indeterminate use while the "^{Legal title}~~property~~" was in an other—the United States; (see Bouvier "Fee") 261, Com. 106; Co. Litt. 7b; 3 Kent 514; or he held as fee farm rent; "The rent reserved on granting a fee farm". Hence, a lease, and re-lease as of right, terminable only by Act of lessee, and coupled with the "preference right to buy" over all others, carried about all there was of this land except the rent reserved: 4% on valuation. "A lease and re-lease have the joint operation of a single conveyance."

2 Bl. Com. 339; 4 Kent Com. 482; Co. Litt. 207.

To have in one's self the power of alienation, as adjudged in the Noel case, is to have property. To have that secure against the world, and enforce-

able by compliance with the conditions, and not dependent upon the act of another, is to have perpetual property—it is all one can have.

We cite the Court to De Peyster case, specifically to page 478 of the 57 Am. Dec. for discussion.

The Congress having parted with the continuous right of possession, dependent only on condition of paying rent, is "letting lands to farm in fee simple instead of the usual methods for life or for years;" 2 Bl. Com. 43, Hargraves notes, 143b, note 5. That they "are estates of inheritance; * * estates in fee simple." *De Peyster v. Michael, supra*, at page 478-479. The lessee holding such an estate was grossly invaded by the Statute, (Appendix "B"), and by the action of the Commissioners in executing the oil and gas lease (Record 14) over his head; and by the operation thereof, under the State's protection, and by the decision of the Supreme Court herein; all in violation, impairment, and destruction of his rights under the Acts of Congress and the Constitution of the United States.

Price's rights are not, however, to be understood as urged by us, wholly dependent on the rule of the DePeyster case. We are impressed with its application here, and its soundness, and it seems

a logical interpretation of the Rules and the Acts of Congress, and adjudications, in this matter. It is not probably what the profession of the present day would readily accept, and it may not have been the realization of the Congress as to the effect of its various grants; but if it is a correct view, it adds additional reason why Price should recover.

**On Review of Movants' Brief.
Apportionment and Disposal.**

Movants in their brief, page 6, quote a portion of Section 8 of the Enabling Act to the effect that Section 33 shall be "apportioned" and "disposed of" as the Legislature "may prescribe" and argue therefrom that:

"This Section, of course, gave plenary power to the State," to do with the lands as it pleased, regardless of the preference rights granted in sec. 9 and 10.

Had this Section 8 stood alone, and Section 10 of the Enabling Act not been enacted, counsel's statement would probably not be questioned, and this suit not existing. But Congress enacted Section 10, too, of the Enabling Act, and fastened the conditions and limitations on the State as follows:

(a) Granting preference right to purchase to the lessee.

(b) As to acreage 160, this being the leasehold acreage.

(c) As to appraisal, by disinterested appraiser.

(d) As to appraisal, by appraiser from other counties.

(e) As to appraisal, to be designated by legislature.

(f) As to appraisal, separating improvements from land.

(g) As to minimum bid being equal to appraisal.

(h) As to leasing, for not more than five year periods under "existing rules".

These "limitations" on its authority the State accepted. (Constitution of Oklahoma, Article XI, Section 1.) So it would appear that the State's "plenary power" lacked about nine material points of being "plenary" according to our dictionary.

As to the "apportionment", the Sections 33 were for "charitable, public buildings, and penal institutions"; to these three classes of fund; we do

not question the State's power as to apportionment, of the fund to these three purposes. We have no interest. But as to the doctrine of "plenary" power to sell as it pleased, and to whom it pleased, or to carve out a separate estate in another, Section 10 of the Enabling Act mutilated that doctrine.

In movant's brief, page 13, there is suggestion that the phrases, when referring to the land "in its entirety", and "all thereof" refer to the "acreage", the full 160 acres, etc. No suggestion of this kind has arisen because the acreage has never been questioned. By "entirety" and "whole thereof" we mean from the "top of the ground to the center of the earth". It being our language and our contention, we have the right to define it.

On said page 13, it is further asserted that Price should have exercised his preference to buy the oil lease immediately after the close of the oil lease sale, or he is barred from asserting any such right. This is another "*non sequitur*". Price denies the Commissioners' rights to make the oil and gas lease; about this there seems no reasonable ground for doubt. He is in no position then to take an oil lease on what he claims as his own land, or on land which he has a right to acquire and own.

They also attempt to shift the burden. The Enabling Act, Section 10, requires of the Legislature that the lessee "be given" the preference right to purchase, "under the rules and regulations as the Legislature may prescribe". The Rules and Regulations prescribed for oil leases (Appendix "B") may be searched in vain for compliance therewith. It neither gives "nor recognizes any preference. None has been extended. And this is but another reason why Appendix "B" is repugnant to Section 10 of the Enabling Act and the Constitution of the United States, and is void.

On the other hand, *if* he had a preference right to buy the land; and *if* the State had a right to divide it up and sell the oil and gas at one time, and the sand and rock at another, and the water and timber at another, and so on *ad infinitum*, the preference right must necessarily attach to each component as it attached to the whole land; and under Section 10 of the Enabling Act, *if* the Legislature has the power to provide for such conduct, which we always deny, then the Statute so providing would have to "give the lessee" at the time a chance and right to exercise his option. This Appendix "B" did not do, and is void for the same reasons above asserted.

But strange to say, movants, on page 14, lines 19 and 22, of their brief assert that "sale" and "sold", as used in Section 10 of the Enabling Act, do not refer to "mineral leasing". We have urged this all along, and that, therefore, the State having only power to sell Sections 33, under Section 10 of the Enabling Act, had no power to "mineral lease"; and that the alleged lease (Record 14) is therefore void, and the Statute (Appendix "B"), attempting to authorize it, is void. We are glad to have convinced them.

However, steering clear of Scylla, they are caught in Charybdis, because they say Section 8 of the Enabling Act provides that "this land shall *not* be sold", (movants' brief, page 14, line 26). This unwarranted statement arouses attention at once, but attention only is required to refute it. There is no ground for the assertion.

All this time the Sale Statute of 1909 (Appendix "C") was in force specifically ordering the sale of Section 33, and specifically granting Price the right to have it sold and his situation in life settled and defined; and granting him right to buy, in preference to all others, and in the absence of all others, at appraisal. So the Legislature for the State did not consider that Section 8, Enabling Act, forbid its sale, and it did not.

And again, be it remembered: The Legislature in 1909 specifically ordered all Sections 33 sold, fixing immediate time (Appendix "C", Sections 1 and 15). This quarter was not excepted, nor was it declared by the Legislature reserved as "valuable for minerals". The Legislature not having so reserved it, no one else could. The power to reserve specific lands until 1915 expressed in Section 8 of the Enabling Act was in the Legislature only, for it alone had the power to elect to sell or not. It was a power of law. The lessee's rights were too sacred to be intrusted to other determination. We think this "are valuable for minerals" must be considered as "known minerals", not subsequently discovered, and is governed in law and act by the rules expressed in *Colorado Coal & I. Co. v. United States*, 123 U. S. 307; *United States v. Iron Silver Mining Co.*, 128 U. S. 673; *Shaw v. Kellogg*, 170 U. S. 312. It is so expressed in Apx. "C", Sec. 1, last line.

Some other assertions in movant's brief are subject to criticism, we think. They assert, brief page 16, regarding our Supreme Court opinion: "Whether the Court was right in this construction is not a question open in this court." The denial of a right claimed under the Constitution of the United States or Act of Congress, is reviewable in

this Court, however carefully the denial may be couched in terms of "construction" for the purpose of avoiding review.

Ward v. Love Co., Oklahoma, 253 U. S. 17, 64 L. Ed. 751 and cases reviewed and cited herein.

They assert: "We have a construction of the Act of Congress which places its fee title in the State", etc., but it is by the State Court. This likewise does not oust this Court of jurisdiction, carefully conferred upon it, to uphold, and preserve constitutional government. See cases last above cited, *supra*. They assert such construction of the Act of Congress by our State Court gave the State a right of "leasing of all of the lands after January 1st, 1915, in any form in which the State might desire". (Movants' brief, page 16, last line, and 17, top.) This we think, does the opinion an injustice. We can find no authority for such statement. If, however, it does so "construe" the Enabling Act, we assert it presents stronger grounds to review such "construction" and preserve the Act of Congress, and again remind the State Court, as in the *Ward* case, that they cannot oust this Court by pretense of construction. (See cases herein, p. 46, *supra*.) Besides, a state Statute is not viewed as has been construed or acted under, but by what may be done under it. *Noble v. Douglass*, 274 Fed. 672.

Movants assert (page 18) that the decision of the Oklahoma Supreme Court is "construction of State law" and final. We claimed our rights under the Act of Congress of 1894, and 1906 (Enabling Act); this cannot be denied or avoided by any "construction" of state law, however diligent the effort. If the statement is true then the State Supreme Court ignored our claim and the Acts of Congress. We claimed the right to have this land sold, and the right to buy it, and that we had bought it under "Appendix 'C'"; that it was a right protected by the Constitution of the United States that could not be taken away by the Commissioners "deem" in 1915, or by any forced "construction" which sought to avoid it. Such a "construction" as they claim would be a denial of equal protection of the law and of due process. This claim cannot be avoided by "construing" the State law; however construed to "deny" the claim, it denies it, and that denial is given the right of review here. See cases above.

Through all of movants' brief, the distinction between "the State", and the Commissioners, or agent of the State, is lost sight of. We feel sure that this Court will notice the confusion of terms without being specifically pointed out.

In movants' brief, page 15, it is further asserted that the "absolute fee simple title became vested

in the State". Thus impairing the "preference right of purchase," granted to the lessee; in fact wholly overriding it. But, it will be seen that by the same grant, and by the same sections of the statute, a preference right to purchase that title became vested in the lessee. Then the State did not take a "fee simple", and counsels' claim is exaggerated because it accepted under the "conditions and limitations" of the Enabling Act by which it took (Const. of Okla., Article XI, Section 1, *supra*); and when the State elected to sell and came to sell, it so recognized and ordered the sale, and sold, "subject to such limitations, exceptions, conditions, rules, regulations and instructions as provided in the Enabling Act" (Appendix "C", Section 1), of which one was the preference right of the lessee to purchase.

The State had no higher title than the lessee, for both came by the same Act of Congress, and the State took subject to the "right" of the lessee. They ran concurrently.

We are not without precedent. The Chickasaw and Choctaw tribes had a "fee simple" in their lands, but Congress as their guardian allowed them to be leased; and under Act of February 19, 1912, (3 Stat. 67, Chap. 46), the lessee was granted,

by Section 2, a preference right of purchase. The Secretary of the Interior in a recent case was compelled by mandamus to execute the deeds in recognition of this right. *Work, Sec'y v. United States, ex rel McAlester-Edwards Coal Co.*, No. 258, decided May 21, 1923.

The provisions of Section 8 of the Enabling Act are to be read, and they do read, consistently with the provisions of Section 10. Section 7 *grants* Sections 16 and 36, and Section 8 grants Sections 13 and 33, each, for its purpose. Section 8 then provides that "Where any part of the lands granted by this act * * *are* valuable for minerals, which terms shall also include gas and oil, such lands shall not be sold by the said State prior to January first nineteen hundred and fifteen." But "may be leased for periods not exceeding five years".

Section 9 provides for permission to sell Section 16 and 36, or lease in ten year periods and not more. Section 10 provides permission to sell Sections 13 and 33, or lease in five year periods, and not more.

Both sections granted preference right of purchase to lessee as of right—no conditions, "ifs", or "ands" about it—in "commanding language" The lands valuable for minerals postponed to 1915 could

only be known minerals, for any other would be "conjectural" mineral, which could as well be one tract as another; or as well one tract, many tracts, all tracts, or none; dependent alone on the purpose, interest, or profit of the "conjector". The language of the Enabling Act "was special, and exact precluding any supplementary or aiding sense," to use the language of this Court in *Ervien* case, 251 U. S. 41.

There is nothing else for the law to work upon except that which is "known". It must stop at the imaginary, the conjectural, the supposed, or the desired. Thus the Sales Act (Appendix "C") reserved from its commanding language "known" mineral land only, until 1915 (Section 1, last three lines). All other was ordered for immediate sale. (Section 15.) This is definite and certain and follows the principles laid down in *Shaw v. Kellog*, and that line of cases, (*supra*), and *Green v. Robinson*, 109 Tex. 367, 210 S. W. 498, that certainty must result from law, not uncertainty.

But the "deem" or "segregation" Act (Appendix "B"), authorized, or attempted to authorize the Commissioners on mere "deeming" land to be valuable,—by mere resolution, without knowledge, finding, or fact known of any kind,—to withhold any part or all the lands granted by the Enabling Act,

from the preference right of purchase granted as of right by Sections 9 and 10 of the Enabling Act, thereby wholly nullifying the grant as to that right, or making it capable of so doing. This, then, is the very astounding position of the State and the Magnolia Petroleum Company in this case.

We are now met (movants' brief, page 16) with the pretension that this is the State's "construction" of the Act of Congress (which said pretended "construction" overlooks the grant of purchase right, by Sections 9 and 10); also that the "remainder of the opinion" was "merely construction" of State Statutes, and therefore not reviewable in this court. The protection claimed from "construction" is here much stretched. It requires no "construction" to see in Sections 9 and 10 of the Enabling Act a permission to the State to sell; and a grant of preference right of purchase, if sold.

It did not require any "construction" to find from Appendix "C" that the State had elected to sell, and sold, and ordered the Commissioners to carry it out—execute it, in most "commanding language" (Section 1 and Section 17), and respected, and re-granted the preference right of purchase (Section 3b) and reserved from its effect ^{until after 1915} only "known" mineral land—no others. (Section 1.)

This Act, its terms, effects, rights granted, and duties imposed, was, it seems wholly ignored in the "opinion". Was this "construction"? The claim of "construction" when used to avoid the effect of a Statute, is often overdone, as in *Ward v. Love County, Okla., supra*. The latest instance, probably, was in *Work, Secretary, v. United States, ex rel, McAlester-Edwards Coal Co., supra*, No. 258, in which mandate issued to the Secretary of the Interior, because he had construed himself from under the Statute. This Court quoted from *Lane v. Hogland*, 244 U. S. 174, and *Roberts v. United States*, 176 U. S. 221, 231, to which we refer, for proper rules of construction.

In the Work opinion, we refer especially here to the Paragraph 2, (in col. 1, page 583, Supreme Court Reporter), wherein by this Court is said "We think the preference right of relator, conferred by Section 4, Act of 1918, was not to be left to the legal discretion of the Secretary in the construction of that Act. There are no words to qualify that which the lessee has as a right granted by the Statute, or to vest in the Secretary the final discretion to determine or define that right."

So here, the lessee of this land had, as a right granted by Statute (Enabling Act), a preference

right to buy this land. There was no discretion vested in any one to determine or define that right. The lessee got it by as high a title as the State,—by the same one, the Enabling Act. “There are no words to qualify,” the rights granted, or to empower any one to “determine” or “define” such rights. It was, and is, his, and no alleged “construction” can be invoked, thereby to deny the right claimed. No amount of “construction” can take out of the Statute, Appendix “C”, the election, by the State, to sell this land; its order and command to sell; the terms fixed; the time when it must be sold; the right granted the lessee, *first*, to have it sold, *second*, to buy at the high bid, or appraisal if no bid; the right to have his status determined; whether he was a temporary lessee, or permanent owner. These were valuable rights, expressly granted, with none to review, or define, and the rights once granted, were irrevocable (Dartmouth College case). To calmly ignore this Statute and its effect is not to “construe” it. The defendant’s rights were denied no matter what the excuse given.

**On Lands Valuable for Mineral Mentioned in
Enabling Act, Sec. 8.**

If, as contended by defendants in error, Price, under the Enabling Act, took a right to buy only the surface, or had only surface rights, and *if* the Legislature could provide that the Commissioners can deem any public land "valuable for minerals, gas or oil," and withdraw it from the law, then it may with equal force be urged by the State that any minerals in the land, that is, any other minerals, subsequently discovered, or supposed to exist, or claimed to exist, belonged to the State, and could be disposed of by it to anyone, at any time it saw fit; and the State could, "reserve" at any time, even subsequent to surface rights sale, assert ownership thereof under this law. It seems to us that the very assertion of this proposition demonstrates the unsoundness of the position of the Defendants in Error taken by them at the inception of this litigation, and since,

The State of Texas owned its lands, as the United States owned these. It provided for their sale by Act of April 12, 1883, which provided: "The minerals on all lands sold or leased under this Act are reserved by the State for the use of the fund to which the land now belongs." Subsequently, legislation passed after sale, attempted to authorize ex-

ploration of these reserved minerals. The Court held that they passed with the land unless "known" at the time the land was alienated, in *Green v. Robinson*, 210 S. W. 498; 109 Tex. 367, following this Court in

Deffenback v. Hawke, 115 U. S. 392;
Shaw v. Kellog, 170 U. S. 312, and others
cited therein.

From these decisions it is clear that, as to minerals, there is a clear distinction as to the effect of law relating to public lands, between minerals "known", and mere "suspected" or "deemed" or "supposed to exist", minerals.

In *Shaw v. Kellog*, 170 U. S. 312, this Court said: "We say lands known to contain minerals, for it can not be that Congress intended that the grant should be rendered nugatory by any future discoveries of minerals", and further, "it would be an insult to the good faith of Congress to suppose that it did not intend that the title, when it passed, should pass absolutely, and not contingently upon subsequent discoveries." ④

Then when Congress, in Section 10 of the Enabling Act, gave to lessees the preference right to purchase, it would equally, we believe, be an insult to the good faith of Congress to assert that thereby it meant only the preference right to purchase the

“surface right”—which, itself, would be subject to destruction at the “subsequent discovery of mineral”, in future years.

And when Congress, in Section 8 of the Enabling Act, said: “Where any part of the lands granted by this Act *are valuable* for minerals, oil and gas, they should not be sold before 1915,” and by Section 10 attached the preference right of purchase to the lessees of all Sections 13 and 33, it had two effects, if any: *first*, to attach the preference right to the land and all of its parts and attributes; and *second*, it postponed the sale of only the “known” mineral lands; it did not deny the preference right to the lands subject to Section 8, but only fixed a nearest date at which they could be sold. It went no further.

The Legislature of the State took this view of it, also, evidently following *Shaw v. Kellog, supra*, because in the Sales Act (Appendix “C”) it will be noted that in Section 1, in the last three lines, it is “Provided further that where any part of the above enumerated and described lands are KNOWN to be valuable for minerals, including gas or oil, such part of said lands shall not be sold prior to January 1, 1915”.

This land was not *known* to be valuable for oil or gas until 1920, (Record 155, finding 11). So it follows that this land was *not* to be postponed as to sale by Section 8 of the Enabling Act until January 1, 1915. On the contrary, it was included and covered by Sales Statute, (Appendix "C"); and, having been appraised January, 1909, (Record 156, finding 6), as not "known" mineral land, and, the lease period having expired January 1, 1909, and only extended by the Legislature to December 31, 1909, (Record —), it at once was a subject of sale under Appendix "C", Section 15.

Hence, we assert, in view of the above decisions, that the Commissioners had no power to withhold the land from sale on January 11, 1911, in Stephens County; and that when Price appeared there and offered to take it at appraisal, it passed under the law to him as found by the Trial Court (Record 155, finding 8 and 10, and Decree 5, Record 157). He did all the law required him to do. Authorities, *supra* ~~2~~ 97

This also precludes any thought that the Commissioners could "deem" any land valuable for minerals, and then withdraw it from the effect of the Enabling Act, and Sales Statute (Appendix "C") which postponed the sale of only "known" mineral lands.

As we understand *Shaw v. Kellog*, and the other cases on this point, Congress never has, and probably can not reserve the unknown minerals in lands alienated, no matter how definitely attempted; but is limited to "known" minerals. If it could not do so, and Texas could not do so, as decided in *Green v. Robinson*, then Oklahoma could not do so as to these Trust lands, and the contention of Defendants in Error is futile.

Effect of the Written Lease Change.

It is contended by Plaintiff, and mentioned in the "opinion" that the lease "contract" (the periodical instrument issued every term expiration), was so written by the Secretary of the Commissioners that the lessee (who signed by mark) contracted away his preference right to buy the land, and all of it, granted by the Enabling Act, and the Sale Statute of 1909. (Apx. "C".) Perhaps they have not in mind these propositions:

(1) The lessee "has no voice in the language of the instrument. The terms are not open to negotiation or agreement. He must abide the action of those whose duty and responsibility is fixed by law. The land officers are not principals, but agents, of the law, and must heed only its will"—not their own schemes, and desires.

Burke v. S. Pac. Ry. Co., 234 U. S. 699;
58 L. Ed. 1527; and cases cited.
Walpole v. St. Bd. Land Comm'rs of
Colo., 163 Pac. 848, 62 Colo. 554.

—wherein it is said the Board is a “mere agent, with duty to do not less, and power to do no more * * * than is provided.” The lease clerk most likely is governed by the same law.

“As the law does not vest the Land Board with authority to make any reservation * * the one attempted here is a nullity and without effect for any purpose.”

Walpole v. St. Bd., 163 Pac. 848; 62 Colo. 554.

In view of this state of the law we cannot see that much weight attends movants' brief, pages 10 and 11, on this and kindred subjects. The Oklahoma Court by Justice Williams, in *Betts v. The Commissioners*, 27 Okla. 64, 110 Pac. 766, held the Legislature strictly to account under the law and denied the Commissioners any power other than to execute the law, and in *Haskell v. Hayden*, 33 Okla. 518, 126 Pac. 232, held the preference right limitations of the Enabling Act enforceable and the rule and regulation power to be legislative only, not to be exercised by the Commissioners. The contractual power, therefore or fixation by the terms, and rights lies in the Legislature only, subject to the Enabling Act, and

not in the Board, and not in the "Secretary of the Board", or the "form" of the lease.

(2) Price cannot read or write, (Rec. 108, bottom).

(3) There was no consideration moving to Price to renounce his preference right of purchase granted by the Enabling Act.

(4) This pretended "lease" bears date of January, 1913 (Rec. 23) at which time the Commissioners had *no authority* to lease said land, as against the positive mandate of the sales statute of 1909, (Appendix "C"). Their only power at that time over Section 33 was to *sell* as "each" then outstanding period expired. (Appendix "C", Section 15) under the appraisal of 1908 (Appendix "C", Section 4). This period as to this land expired December 31, 1909.

It was appraised in January, 1909 (Rec. 97-8-9, 100), and appraisal approved March 25, 1909, (Rec. 101). The original lease covering this land executed June 8, 1902, ran until January 1, 1905, (Rec. 42); the next one from January 1, 1905, to January 1, 1908, (Rec. 45); the next one by House Bill 414 of Session Laws to January 1, 1909, (Rec. 48-9, Ex-
"C"), which made this land subject to sale under

the sale Statute of March 2, 1909 (Appendix "C"), at that time. It was again extended by executive order and legislative action to December 31, 1909 (Rec. 50-1, Exhibit "E"), but the power to lease, by the Commissioners, was never again enacted.

In this state of the law, under the Enabling Act and Sales Act of March 2, 1909 (Appendix "C"), Price bought out prior lessee, and took assignment in October, 1909, (Rec. 51-52, Exhibit "F"). The other three-quarters of this Section 33, and all other granted lands in the county, were offered and sold to the lessees at appraisal (Stipulation Paragraph 9, Record 117, (a) to (g) Record 118), in January 1, 1911, hereinbefore shown. At that sale Price demanded his land at appraisal, and we think that in law it was then sold, and the Trial Court so found (Record 155.) There is no legal reason why this was not sold, therefore, and no authority of law whereby the Commissioners could pretend to lease it after Appendix "C" became law, March 2, 1909; that the Statute gave no power to lease—its order was to "sell"—mandatory and ultimate, and therefore, in 1913, the Secretary to the Commissioners of Oklahoma could not change, by pretended "lease" instrument, the legal status of Price.

On the Opinion of the Supreme Court of Oklahoma.

We approach a discussion of the opinion of our State Supreme Court with much hesitation, but there are some parts thereof that we think draw attention.

In Syllabus I (Rec. 170), it is stated that Act of Congress, March 3, 1891, 26 St. at L. 1043, does not provide for preference right of re-lease "nor do any subsequent acts" "prior to the Enabling Act", etc. This, we think erroneous.

The rules (Rec. 133, 134) do so provide, and Congress ratified and affirmed and adopted them in the Act of May 4, 1894, 28 St. at L. 71. It was so adjudicated in cases cited the court, to-wit:

Noel v. Barrett, 18 Okla. 304;

Clark v. Frazier, 177 Pac. 589 (Okla.).

So the statement of the Court seems unsupported; this Act was cited in brief, and quoted by the Court in its "Opinion" (Rec. 176); but it seems to have overlooked the effect of the Act, the rules themselves, and above decisions.

These rules were not amended by the Legislature, but the first State session legislatively extended existing leases to January 1, 1909, (Appendix

“A”, Sec. 1), and the preference right has always been preserved. The Enabling Act carried over the “existing rules”.

In Syllabus 2, the “moving purpose” of the reservations is expressed “for public buildings” (as to Sec. 33). But this is a “*non-sequitur*”, to use the Federal Court’s expression in *Noble v. Douglass*, 274 Fed. 672; while the “moving” purpose may have been to provide a building fund, the purpose was, so Congress thought, best accomplished by giving security of tenure to lessee, by preference right of release, and of purchase, thus increasing improvements, increasing revenue from bettering tenancy, and improving citizenship; this is evidenced in the record by the value and character of improvements, to-wit: Two story house, barns, wells, fences, orchard of 800 trees (Rec. 103), value \$1290.00 (Rec. 100). It marks the difference between “chain harness and shuck collar tenantry,” and permanent husbandry. Even if the Court’s statement be accepted, the Enabling Act was before statehood and soon enough for Congress to appreciate the lessee’s efforts, and secure him in his preference rights. The Court should have respected the will of Congress so expressed, even if considered tardy, which it was not. Sec. 10 of the Enabling Act (*supra*) expressly

extends the "existing rules" for leasing, which rules carried the preference right affirmed in *Noel v. Barrett*, 18 Okla. 304. We think the State could not impair this right afterwards because protected by the Constitution of the United States, Article 1, Sec. 10.

Syllabus 3: What has been said above meets the statements of Syllabus 3, with equal force.

In Syllabus 4, the Court says the Enabling Act and the Constitution of Oklahoma constituted a compact which "superseded all previous acts, rules and regulations in conflict therewith". There being none in conflict, we fail to see the sequence of this statement. We urged, and now urge that the Enabling Act expressly preserved and carried forward the preference right acquired under the rules and regulations promulgated, and extended the preference rights to lease, re-lease and to purchase in event of sale. See Enabling Act, Sec. 10 *supra*, and Constitution of Oklahoma, Article XI, Sec. 1, for its acceptance.

Syllabi 5, 6, and 7 relate to compelling the State to sell. A straw man, set up, and knocked down. Such proposition was never urged. We urged that the Enabling Act permitted a sale (Sec. 10), and the Constitution of Oklahoma permitted a sale (Art.

II, Sec. 4), and the Legislature ordered, and in fact and in law opened to sale, or sold the lands, and granted the right of purchase to lessee on certain terms expressed in the Sales Statute (Appendix “C”). After that Statute the lessee has but to comply therewith, and the Officers are by law compelled to carry out the Act, and failing so to do, the lessee’s rights are not prejudiced thereby. The Trial Court so found and so decreed, following this court in *Lytle v. Arkansas*, 9 How. 314, which were cited to the Supreme Court but by it overlooked. So these Syllabi are foreign to the case.

Syllabus 8 is incorrect. The phrase, “terms of his lease contract”, is misleading. As we read the law where officers are authorized to make a lease or other official contract, the law constitutes the “terms of the lease”; the officers can give mere formal expression thereof, but cannot change, or withhold rights therefrom having no discretion, no bargaining power, and no power to alter the terms of the law. We relied upon and cited:

Burke v. So. Pac. Ry., 234 U. S. 699;
Walpole v. St. Bd. Land Comm’rs. of
Colo., 163 Pac. 848.
See, also, *supra* p. ~~39~~ and ~~40~~, **126-129**

but the court apparently overlooked them, and the rule, “There can be no consideration for changing

the law in official dealings with the citizen". The Commissioners and their Secretary had no power to "fix terms" with lessees or change the law :

Betts v. Comm'rs., 27 Okla. 64, 110 Pac. 766;

Haskell v. Hayden, 33 Okla. 518, (at 520-521), 126 Pac. 232.

Syllabus 9: It is also a "*non-sequitur*", if the Sales Statute (Appendix "C") shows, as we contend, that the State by it "elected" to sell the land; by its clear language, it not only expressed "election" to sell the land (Sec. 1) but fixed all the terms, time, and price subject to the Enabling Act, and re-granted the lessee preference right over all others to buy at that time, and on those terms (Sec. 3b); and expressly granted the lessee right to buy at the State's appraisal, even if no person bid (Sec. 11, last sentence); and such sale was *not* limited, as the court limited it, to "agricultural" lease, without safety of possession, or right of possession, but extended to *all* the land, contents and possession, without restriction or limitation; it carried the land and all its incidents of ownership.

The Statute expressed "election" to sell, until this decision abrogated it. We think the Court merely overlooked the Statute. We are confirmed in this thought by the fact that the long opinion of

the Court cites not the Statute, or any provision thereof, other than to say it does not "violate any of the conditions imposed by the grant aforesaid" (Rec. 184, top), referring to the Enabling Act. No one has contended that it did. But if it did *not* violate the Enabling Act, some effect must, or should be given its terms which the Court did not refer to, quote, discuss or apparently consider but ignored on the point raised;—that it did order sale, and for the State, grant to lessees the right of purchase; and concurrently with the Enabling Act, granted preference right of purchase of the whole of the land. So, for the purpose of this case, the Statute was, like the Enabling Act, wholly overlooked as to effect, and no one of the cases cited to the Court, and now cited this Court, were referred to or discussed. The opinion seems to be one of original impression.

But the opinion says, (Rec. 183, par. 3), "should it (the State) *sell* any of them, or lease any of them (lands) such sale, or lease must not violate the conditions of the grant." To this we give full assent. But one of the "conditions of the grant" was that if leased, it should be leased "under existing rules" which carried a preference right of release (18 Okla. 304); and, if sold, the preference right of purchase must be extended to the lessee,

Price. This is violated by the oil lease Statute (Apex "B"), and the oil lease (Rec. 14), because neither extended Price his preference right; and, since the oil lease gave the right to take contents of the land, and occupy and possess it and destroy everything that interfered, and take the water, timber, and stone necessary for "five years, and as long thereafter as oil or gas, or either of them may be found in paying quantities", which might be forever, or of unlimited duration—

People v. Bell, 237 Ill. 332;

Bruner v. Hicks, 230 Ill. 536;

Both cited in *Guffey v. Smith*, 237 U. S. 101, at page 113,

—it is clear that never thereafter could Price enjoy his "preference right of purchase" of the land granted him by the Enabling Act, Sec. 10, until this oil and gas conveyance was removed. If, on the other hand, the oil lease was a sale or alienation, as held in

Eldred v. Okmulgee, 22 Okla. 742;

Hoyt v. Fixico, — Okla. — (not officially published); 175 Pac. 517;

Guffey v. Smith, 237 U. S. 101;

United States v. Noble, 237 U. S. 74;

Texas Co. v. Dougherty, 107 Tex. 226,

then, it is clear that Price could never thereafter enjoy his right of purchase, because it had been already sold, and the valuable contents taken and the

surface, and the ability to use the surface destroyed; because a drilled out oil land is destroyed for all purposes of man.

It is clear, therefore, that the opinion held out words of hope in virtuous language, and delivered destruction in its decision and order.

The opinion refers to the oil lease segregation Statute (Apx. "B"), and says the Commissioners "duly segregated the land in question from sale because of the oil and gas '*supposed*' to exist therein", and that the results "conclusively warranted" it (Rec. 184, Par. 3). We did not come to try the "warrant" of the Commissioners' judgment, in profit, but only their warrant in Law.

This "segregation Statute" was passed March 2, 1908 (Apx. "B"). The Sale Statute was passed March 2, 1909, which ordered this land "sold" (Apx. "C"), leaving no loophole for segregation, or withdrawal, except for "known" mineral (Sec. 1). The two Statutes cannot co-exist. If the Commissioners obey the order to sell, except where "known" minerals they could not "duly segregate *from sale*", because of oil and gas "supposed to exist therein". They cannot do both, and language is futile that so says. Again, they did not "duly segregate from sale" until 1915, long after the sale

occurred in Stephens County in 1911. Again, they cannot "duly segregate from sale" in 1915 after the sale Statute of 1909 (Apx. "C") and sell to the Magnolia in 1919, and yet protect Price in his right to have sold under sale Statute and his preference right to buy, granted by the Enabling Act, and Sale Statute of 1909. From all of which it is clear that the right of purchase claimed by Price under the Enabling Act was denied existence, then and forever, before and after. Hence this case presents a question of the constitutionality of the "segregation Statute" (Apx. "B"), of 1908, and of authority claimed thereunder, and of a right claimed under the Act of Congress (Enabling Act), and is a proper one for this Court.

The opinion further descants on the "hundred fold more to the State from the oil than from sale", etc., (Rec. 184, last paragraph). This would "conclusively warrant" the state "duly segregating" all the Magnolia's properties, too, and many others. All would profit the State "an hundred fold"; and this, in itself, may "conclusively warrant" the action and the opinion; but we know the opinion was not warranted by such "dreams of avarice" realized. It sprang merely from mistaken view, we think, of the Law.

In the opinion it is further said (Rec. 185, second paragraph) "the Commissioners could not have acted in good faith to the trust imposed in them" if they had "advertised this land believing it contains oil and gas products which would pay a hundred fold more to the State than the sale of the land would pay", etc. This we believe "*non-sequitur*" also. They sold to the lessees the other three quarters of this section; all richer in oil than this quarter. They sold every quarter in the county but this and one other; they sold every quarter in the six counties but six or eight; they sold thousands of quarters all over the State, many of them, it is known, "swimming in rich pools of oil", to quote from the opinion, (Rec. 185, bottom). If they were recreant to their trust, should not such lands be recovered by a vigilant State? But if they knew and believed all this, they hazarded it all in the sale of the first "oil lease" on this land for the paltry sum of \$165.25 (Rec. 82) which lease was voluntarily surrendered. (Rec. 85, Exh. 6.) They have not been "criminally prosecuted for making such sale", as fearfully suggested in the opinion, (Rec. 186, top). The opinion further credits them with power of Divination, for it says "they were apprised of the oil values of the land". This we think the first instance in history, and we dislike to doubt it, but we

must. We think this must be credited to the enthusiasm of authorship, and can hardly be assigned as error of law, as no one is apprised of oil until he finds it with the bit.

But, if the Commissioners could so "duly segregate from sale" one tract of the granted lands on "supposition", they could duly segregate from sale two tracts, an hundred tracts,—all of it. In which case, what becomes of the provision of the Enabling Act granting lessees the right of purchase at the highest bid? What becomes of the provisions of the Constitution of Oklahoma, Art. XI, Sec. 4, that permits sale, but does not permit oil and gas lease? Authority to sell is not authority to lease, or traffic in lands,—

Thomason v. Upshaw Co. Tex., 211 S. W. 325 (Tex.);

Dallas v. Club, Co., 95 Tex. 200; 66 S. W. 294;

Pulliam v. Runnells Co., 79 Tex. 363, 15 S. W. 277,

particularly as in an oil and gas lease where a component part of the land is removed, or destroyed, and the surface rendered valueless. What becomes of the Legislative will expressed in Sales Statute (Apx. "C") and the right of purchase granted lessees therein? They simply do not exist, that's all.

So we think the opinion unfounded in the law, even though "conclusively warranted" in the oil; and we assign the decision following as erroneous, and ask its reversal, and an accounting as decreed by the Trial Court. We are not unimpressed by its "hundred fold" profit to the State so oft repeated and so strongly stressed in the opinion, and to those running along with it, in the enterprise; but the Magna Charta and its antecedents are before us; "those fundamental rights to life, liberty, property, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of Constitutional law * * * so that * * * a government of Law and not of men may exist", stares at us from the opinion of this Court in *Yick Wo v. Hopkins*, 118 U. S. 356, bidding us hope that Price's rights may be considered here, instead of the "hundred fold" benefit to the State, as recited below. The wealth of a State is in its probity, not its oil.

(Besides, the "hundred fold" was a figure of speech very largely. The oil value was not so extravagant as that. It was shown to be fairly valuable. We find no occasion for the exuberant language therefore, either in Law, or fact. The Record does not show it—until you reach the "opinion".)

This part of the opinion however is the highest evidence of the breach of the Trust created by the Enabling Act, instead of its observance.

It was when the State sought to effectually defeat the preference right of purchase in order that a promised speculative profit might be obtained that a breach of trust was committed. It seems very clear that the State could not defeat the lessee's preference right of purchase without violating the trust enjoined upon it, for if the lessee's preference right of purchase is a thing of value, it could not be defeated by state legislation or authority exercised under the State without impinging upon such right, and such trust. The promise of greater gain to the State would afford no legal or moral justification for the attempted nullification.

This, we think, is the principle affirmed in *Evriem v. United States*, 251 U. S. 41, 64 L. Ed. 128, where in defense of the state legislation, it was set up that it was the hope of the state to thereby increase the demand for the purchase and leasing of the granted lands, and in the enhancing of the prospective prices to be derived therefrom.

Answering this defense, the Court directed particular attention to the specific language of the dedication: "precluding any supplementary or aiding

sense, in prophetic realization. * * * That the State might be tempted to do that which it has done, lured from patient methods to speculative advertising in a hope of speedy prosperity.”

Referring further to the conditions presented, urging the wisdom of the act, it was said:

“It must be admitted there was enticement to it and a prospect of realization, and such was the view of the District Court. The court was of opinion that a private proprietor of the lands would, without hesitation, use their revenues to advertise their advantage, and that that which was a wise administration of the property in him could not reach the odious dereliction of a breach of trust in the state.”

The position of the State was held untenable, without extending “the argument, or multiplying considerations. The careful opinion of the Circuit Court of Appeals has made it unnecessary”.

This Court further said therein: “that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact performance of the conditions.” This is all we ask here.

In the Circuit Court of Appeals in the *Ervien* case, it was urged “that an advertisement of the entire State would benefit every portion of it, and

that the attraction of homeseekers and investors would make for a wider and better market for the trust lands". This contention was rejected, the Court saying: "But Congress made definite provisions specifying the character and extent of the notices of sale". In conclusion, it was held that the grant upon the "conditions and limitations prescribed" having been accepted by the Constitution of New Mexico, Art. 21, paragraphs 9 and 10, and some of the trusts being for such purposes as the establishment of insane asylums, etc., the Act of New Mexico of March 8, 1915 (Laws 1915, c. 60), authorizing the Commissioner of Public Lands to expend annually three cents on the dollar of the annual income from sales and leases of lands for making known the resources and advantages of the State, particularly to homeseekers and investors, was in its application to the proceeds of such trust funds, invalid, as in conflict with the "conditions and limitations" of the grant, and compliance therewith by the Commissioner of Public Lands was enjoined.

The question of the State's authority is not to be determined by the fact, or belief, that the State will profit as the result of the State legislation, but has it the power, constitutionally, to defeat or im-

pair rights attaching under the grant, or to do that which violates the trust, or contravenes the purpose of Congress in making the donation, and which the State irrevocably accepted "for the uses and purposes and upon the conditions and under the limitations for which the same are granted or donated"; and in its Constitution, Art. XI, Sec. 1, pledged the faith of the State to "preserve such lands * * * and all moneys derived from the sale of any of said lands as a sacred trust, and to keep the same for the uses and purposes for which they were granted or donated."

On Injunction

Other points of law are raised by this suit that should defeat it:

(1) Price was in possession, as lessee, for a long period, 1908 to 1919. He peacefully resisted the invasion by the Magnolia until the Court tied his hands, and he yielded to constituted authority. The Magnolia sought to eject Price and secure possession by injunction. The plaintiff, Magnolia, in due process of law, must recover by the strength of its own title. It declared on a lease or grant that, as we have shown by *Guffey v. Smith*, 237 U. S. 101, and other cases herein, being "for five years and as

long thereafter, etc.,” was a lease or grant in place capable of indefinite duration. This violated the Enabling Act, Sec. 8 and Sec. 10, which permitted lease for “not more than five years” of Section 33. The lease was, therefore, void, and the suit should be denied and the costs and expenses put on plaintiff, and the Statute (Appendix “B”), having attempted such authority, should be declared void, as repugnant to the Act of Congress and the Constitution of the United States.

(2) Defendant being in peaceful possession under claim of right, the proceedings in injunction were not due process of law established in Oklahoma to eject him, and put another claimant in possession.

Sproat v. Durland, 2 Okla. 24; 35 Pac. 682, 886;

Black v. Jackson, 177 U. S. 349.

(3) This “injunction” in Oklahoma is a preventive remedy, not an assertive one.

(4) The Statute (Appendix “B”) forbade the lease of any public land to a “pipe line company” (Appendix “B”, Sec. 5). It was admitted that plaintiff is such. Its charter shows it. We do not ask that the case be dismissed on any one of these three preceding grounds, unless it is adjudged herein that defendant, Price, had, at the beginning of this

action, no interest, claim, or right or immunity as to said land which he could assert in law. If he had any right under the Enabling Act and Sales Statute (Appendix "C") that right is sufficient upon which to recover in this action. The Trial Court held that he had rights, but the Supreme Court denied him every vestige of claim. Thus is presented a clear cut issue of what the Enabling Act means; and, if it means not these things he has contended for, it means, at least, that he was entitled to protection of his possession and improvements until his right thereof and thereto was extinguished by due process of law, and paid for before the property was disturbed.

Constitution of Oklahoma, Art. 2, Sec. 24.

Denial of that right is a denial of due process of law and impairs defendant's contract of citizenship, as expressed in the Constitution, and is repugnant to the Constitution of the United States, Art. 1, Sec. 10.

Truax v. Carrigan, 257 U. S. 312; 66 L. Ed. 254.

And, if it means not even this, it must mean that the rule expressed in *Atherton v. Fowler*, 96 U. S. 513; 24 L. Ed. 732, applies that where one has peacefully initiated his claim on public lands, he is enti-

tled to be protected in his possession and enjoyment, and in the prosecution of his proceedings for title, or while awaiting a title in abeyance.

Haws v. Victoria Co., 160 U. S. 303; 40 L. Ed. 436;
Del Monte v. Last Chance, 171 U. S. 75; 43 L. Ed. 72;
Erhardt v. Boaro, 113 U. S. 527; 28 L. Ed. 1113;
New England Co. v. Congdon, 152 Cal. 211; 92 Pac. 180;
Miller v. Cressman, 140 Cal. 440; 73 Pac. 1083,

and also against legislation where he had accepted under former legislation.

Union Pac. v. Harriss, 215 U. S. 386; 54 L. Ed. 246;
Washington & I. Ry. Co. v. Osborn, 160 U. S. 103.

Possession by Price was, of course, notice to the Magnolia of all he claimed, as also was his existing lease; and the Law; and the number of the Section (33), notice of all he could claim thereunder.

Guffey v. Smith, 237 U. S. 101, at p. 118.

If in this we are mistaken, and if the preference right carried with it anything of value, then as we have already seen, the Commissioners could not lawfully, pending a sale, cause the land to be exploited for oil and gas by another, the result of which would be to destroy the value of the land to

him. In other words, he had a protectable interest, (*Schwab v. Wilson*, 72 Kan. 617, 84 Pac. 123), which would defeat plaintiff herein.

Conclusion.

Wherefore, Petitioners in Error pray this Court to vacate the judgment, decree and order of the Supreme Court of the State of Oklahoma, and re-instate and establish the judgment, decree and order of the District Court of Stephens County, Oklahoma, in this case entered (Record 152-159); or, if the judgment of this Court be different therefrom in any degree, then, the whole case being here, that this Court order a judgment decree proper under the law, in favor of said defendant, Price, and that the case be reversed and be remanded, with directed judgment.

J. F. SHARP,
C. B. STUART,
M. K. CRUCE,
W. C. STEVENS,
E. E. BLAKE.



APPENDIX "A"

An Act.

TO PROVIDE for the appraisement of the lands granted to the State for educational and other public building purposes; authorizing the commissioners of the Land Office to procure geographical and statistical information concerning the same: providing for the renewal of certain leases thereon pending such appraisement and authorizing the Commissioners of the Land Office to make leases thereafter and declaring an emergency.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. All leases expiring between December twenty-fifth, nineteen hundred seven, and April fifteenth, nineteen hundred eight, are extended without further act of the commissioners of the land office until January first, nineteen hundred nine, in all cases where lessee desires extension; and that such extension shall be made at such advance, if any, above the annual rental, as shown by the last lease contract, as the commissioners of the land office may deem fair and just; Provided, any lessee feeling himself aggrieved by the action of said commissioners of the land office may, by application to such commissioners, present his objections, and said commissioners are empowered to adjust the rental in such cases as they may deem fair and just.

Sec. 2. It shall be the duty of the commissioners of the land office to cause an appraisement to be made as soon as practicable of all lands granted to the State for educational and public building purposes. Said appraisement to contain a complete description of said land, showing the number of acres in cultivation on each quarter section, the

amount of cotton, corn and other farm products raised on said land for the year nineteen hundred seven and nineteen hundred eight, the actual cash value of said land with the improvements thereon, the value of the improvements, giving a description and kind of said improvements, the cash value of the same, the number of years said improvements have been on said land, the name of the lessee occupying same, and if the land leased is not occupied by the lessee, and the same has not been subleased by the lessee, give the price for which said sublessee pays per acre. Said appraisement to contain a list of all lands suitable for townsite purposes, and state whether or not any of said land is now being used for townsite purposes, and if so, the kind and character of buildings thereon, said appraisement to contain a complete geographical and statistical report by counties and such additional information as may be required by the commissioners of the land office; Provided, the appraisers shall not be appointed from the county in which the land to be appraised is located or from any county adjoining the county in which the land to be appraised is located; and Provided further, that no one who has any interest or claim in any of the school lands shall be appointed as such appraiser.

Sec. 3. It shall be the duty of the commissioners of the land office to make a detailed and summarized report of all the statistics obtained under the provisions of this Act, to the next Legislature, on or before the fifth legislative day thereof.

Sec. 4. All laws, rules and regulations in conflict herewith are hereby repealed.

Sec. 5. For the preservation of the public peace and safety, an emergency is hereby declared to exist, and this Act shall take effect from and after its approval.

Approved April 8, 1908.

APPENDIX "B"

An Act.

TO AUTHORIZE the Commissioners of the Land Office to Lease Public Lands for Oil and Gas purposes.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. When any tract of the school and other public lands, granted to the State of Oklahoma under the Act of Congress known as the "Enabling Act" is, by the commissioners of the land office of the State, known to contain oil or gas, or where such lands are, by said commissioners, deemed valuable for oil and gas purposes, such commissioners shall enter of record in their office, their finding, declaring that such oil or gas character exists, and further declaring that the oil and the gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this Act.

Sec. 2. Each agricultural, timber, grazing or other lease to any surface interest in the deposits segregated, as provided in section one hereof, and further reserve to the State and its lessees and grantees the right to drill and operate oil and gas wells on such premises, and the easement use and right of way to enter upon and fully enjoy the mining right reserved in this Act.

Sec. 3. The oil and gas interest described in this Act in such lands may be leased by the commissioners of the land office for oil and gas purposes to the same extent and in the same manner as a private owner of lands in fee could, in his own

right, execute a grant thereto, subject, however, to the following limitations:

First. For a period not exceeding five years, with suitable provisions for preference right to re-lease for a second term of five (5) years at its expiration, at the maximum rate of rents, royalties and bonuses that may be obtained therefor, at the time of such renewal.

Second. Upon due advertisement and public notice of not less than thirty days, in such manner as such commissioners may, by rule, prescribe.

Third. Such leasing shall be done under public bids and awarded to the highest responsible bidder; Provided, the commissioners of the land office shall have power to reject any and all bids.

Sec. 4. The lease contract of the State with any lessee for oil and gas purposes, shall stipulate, and the advertisement for bids for leasing such land shall specify a fixed royalty, to be determined by the commissioners of the land office, and in no event less than $12\frac{1}{2}$ per centum of the total output of such oil and gas, and in addition thereto any bonus offered for such lease, and shall also require a deposit of sufficient earnest money in the hands of such commission as such commission may require to accompany each bid, with appropriate conditions of forfeiture for failure to comply with the terms and conditions of bidding upon such lands. All leases for oil and gas provided in this Act shall contain a provision requiring the lessee to drill a sufficient number of wells upon the leased premises to offset the wells upon adjoining contiguous premises, and a further provision that a failure to faithfully operate the leased premises for oil and gas to as full an extent as individual and corporate premises are being operated within the general oil and gas field where such land is located, shall forfeit such lease to the State. No transfer

or assignment of any lease shall be valid or convey any right in the assignee without the consent in writing of the commissioners of the land office. The board of land office commissioners shall require a good and sufficient bond for the faithful performance of said lease and may make such additional rules and regulations covering same as are not specifically provided for in this Act.

Sec. 5. No lease shall be executed to, or in the interest of any pipe line or transportation company, or any company allied to, or confederated therewith or any subsidiary company thereof, nor any other company, corporation, person or association under the control of either or all of them, nor to any stockholder, officer, director, agent, representative or employee, acting singly or as firms or corporations of such company, or either of them. Leases executed under the terms of this Act shall stipulate that, for any refinery or crude oils and its products and by-products, owned, operated or controlled by the State, the State shall have the preference right to purchase and receive the output of such oil and gas lease at the market price thereof; Provided, nothing in this Act shall prevent the lessee from selling the output of said leases to any person, firm or corporation whatsoever until notice in writing from the commissioners of the land office shall be served on the lessee that the State is ready to take such oil and gas, or either of them, and all sales of oil and gas under this proviso shall be valid and binding.

Sec. 6. Any person, firm or corporation leasing under the provisions of this Act, and operating for oil and gas, shall be liable to the surface owner, the lessee or purchaser, for all damages or loss accruing to the surface interest in said land and to all crops and improvements thereupon and appurtenances and hereditaments thereunto belonging,

whether said land be agricultural, timber, grazing or otherwise.

Sec. 7. Should the lessee or owner of the surface interest and the lessee of the oil and gas interest specified in this Act be unable to agree upon the damage and loss sustained by such surface lessee or owner by such lessee of the oil and gas interests therein, may condemn the same for such purpose under the law of eminent domain to like extent and in the same manner and upon the same procedure and remedies as is provided for the assessment of damages and compensation to the owner of the fee in case of condemnation for railway purposes.

Sec. 8. The commissioners of the land office shall have plenary power and authority to enter their finding of record in their office, modifying, altering or vacating any order, finding, or entry, and when any tract or parcel of land shall be proven to be valueless for oil and gas purposes, or such tract of land or the oil and gas field in which the same is situated shall become impoverished and exhausted, then such commissioners shall enter of record of their finding of such non-oil and gas bearing character, or of such exhausted or valueless condition for such oil and gas purposes, and when so entered of record by such commissioners, the oil and gas character of such land shall conclusively terminate. Upon premises leased for oil and gas purposes, no finding or other entry of record shall be made, modifying, altering or vacating any order, finding or entry, previously made until notice of not less than ten days shall be given by registered mail to the last known address of such lessee, or by posting notice in writing in a conspicuous place upon the premises vacated by such new finding, order or entry.

Sec. 9. The proceeds derived in bonuses and royalties and from other inducements and considerations for the execution and operation of the oil and gas leases in this Act provided, shall be carried into the several funds, for the use and benefit of which such lands were granted to the United States to the State of Oklahoma, and to the territory now comprising the area embraced within the said State under the provisions of the Enabling Act, and any and all other Acts of Congress, for the uses and purposes, and upon the conditions and under the limitations for which the same were granted, and the money resulting from such lease and from the operation thereof shall be handled, disposed of and used in like manner as the other moneys belonging to said several funds under the laws of this State.

Sec. 10. All Acts and parts of Acts, rules and regulations, as well as the alterable provisions of the schedule of the Constitution of the State, in conflict herewith, are modified, amended and repealed to conform hereto.

Sec. 11. An emergency is hereby declared, by reason whereof it is necessary, for the immediate preservation of the public peace and safety, that this Act take effect from and after its passage and approval.

Approved May 26, 1908.

APPENDIX "C"**Sale of Certain Lands Provided For.**

Amended Senate Bill No. 1.

AN ACT providing for the sale of all the public lands owned by the State of Oklahoma Taken in Lieu of Lands Embraced in Sections Numbered 13, 16, 33 and 36, according to the United States Survey, known as "Indemnity Lands;" Providing also for the Sale of all the Lands Embraced in Sections Numbered 33, Reserved by the United States and Granted to the State; Providing also for the Sale of the Tracts of Land Now Platted and used for Townsite Purposes Embraced in Sections Numbered 13, 16, and 36; and Providing also for the Sale of all the Lands withdrawn from the Public Domain, Reserved from Homestead Entry and Granted to the State under and by virtue of Section Twelve of an Act of Congress, Approved June 16th, 1906, known as the Enabling Act of the State of Oklahoma; Subject to certain Exceptions, Conditions, Rules and Regulations as herein Provided for; And Providing Penalties for the Violations thereof.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

Section 1. The Commissioners of the Land Office shall dispose of, sell and convey, subject to such limitations, exceptions, conditions, rules, regulations and instructions, as provided in the Enabling Act, in this act, or any act amendatory hereof, except where same is embraced in any reservation specifically reserved from sale in this act or in act of Congress or any act of the state specially reserving any part thereof, for any special purpose, all of

the following enumerated and described school and public lands of this state;

All lands owned by this state, reserved, granted and taken in lieu of sections numbered sixteen (16), thirty-six (36), thirteen (13) and thirty-three (33), and known as Indemnity Lands; Provided, that when such lands or any part thereof are sold and conveyed, the proceeds derived therefrom shall be prorated among the several funds as their interest may appear, and used as provided by law; also all lands embraced in sections numbered thirty-three (33) in that part of the state formerly known as Oklahoma Territory, and granted to the state for charitable and penal institutions and public buildings; Provided, that all the money derived from the sale of any or all of said lands, shall be apportioned and disposed of as may be provided by law; also all lands granted to this state by the United States under and by virtue of section 12 of the Enabling Act for the following purposes, namely: For the benefit of the Oklahoma University, two hundred and fifty thousand acres; for the benefit of the Agricultural and Mechanical College, two hundred and fifty thousand acres; for the benefit of the University Preparatory School, one hundred and fifty thousand acres; for the benefit of the Colored Agricultural and Normal University, one hundred thousand acres; and for the benefit of the normal schools now established or hereafter to be established, three hundred thousand acres; Provided, that all money derived from the sale of any of said lands shall be invested for said state in trust, and interest thereon shall be used exclusively and as above proportioned in the support and maintenance of said school; Provided, that if any tract, part, or parcel of any of the land enumerated and described in this section, was or shall be returned to the Commissioners of the Land Office by a board of appraisers thereof, including those tracts of land

embraced in sections numbered thirteen (13), sixteen (16), and thirty-six (36), and otherwise herein reserved from sale, that are now platted and occupied and leased directly from the State or Territory of Oklahoma for townsite purposes, as being more valuable for town site than for agricultural purposes, then such tract, part or parcel of such land shall be by said Commissioners of the Land Office, reserved from sale and disposed of under the terms of this bill; Provided, further, that where any part of any of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of said lands shall not be sold prior to January 1, 1915.

Section 2. All proceeds of the sale of such lands described in section 1, of this act shall be sacredly preserved for the use and benefit of the several funds, institutions, and purposes for which said land was granted by the United States to the State of Oklahoma, under the provisions of the Enabling Act, and of any and all other acts of Congress, and by the Constitution, for the uses and purposes, and upon the conditions and under the limitations for which the same was granted and the money resulting from such sale shall be handled, disposed of, and used by the state in like manner as the other moneys belonging to said several funds under the laws of this state.

Section 3. (a) No person shall be permitted to purchase more than one quarter section of land under the provisions of this act, except as provided by the terms of the Enabling Act; Provided, however, that the land granted to the state under and by virtue of section 12 of an act of Congress, approved June 16, 1906, commonly known as the Enabling Act, commonly called "New College Lands", shall be classified by the Commissioners of the Land Office from the appraisement heretofore made as

agricultural and grazing lands. All of said lands which has of its surface twelve and one-half per cent or more and less than thirty-seven and one-half that is tillable, productive and suitable for farming purposes, shall be classified as Class A, and said class of grazing land shall be sold in tracts not to exceed one section; and all lands having less than twelve and one-half per cent of its surface that is tillable, productive suitable for farming purposes; that is rough, mountainous or barren, shall be classified as Class B, and sold in tracts not to exceed two sections if in the opinion of the Commissioners of the Land Office it is deemed best and proper.

(b) Any lessee holding a lease on any of the lands described in section 1, of this act, except New College Lands, shall have the preference right to purchase one hundred and sixty (160) acres so leased at the highest bid at the time of the sale of the same as hereinafter provided in this bill; Provided, further, that none of the lands enumerated in section 1, of this act, except the lands that bear no preference right which were secured under and by virtue of section 12, of the Enabling Act, which is under lease to any person or persons holding a lease on more than one hundred and sixty acres, on which he may claim a preference right of purchase, shall be sold until such lessee shall file a written waiver of his preference right to purchase any of such land so leased, except one hundred and sixty acres, with the Commissioners of the Land Office, and the said Commissioners shall reserve the same from sale until such waiver is so filed, and the purchaser shall accept said land with condition of such waiver; Provided, further, until the lessee of any land so leased on which he may claim a preference right of purchase does waive his preference right on all lands in excess of one hundred and sixty acres, he shall pay to the state as rental or lease not less than six

per centum of the value as fixed from time to time by the appraisers appointed by the Commissioners of the Land Office.

(c) The Commissioners of the Land Office shall, as soon as possible, after the sale of lands, transmit to the clerk of each county in which any lands mentioned in this article have been sold, a detailed description of each parcel of the land so sold and the names of the purchaser, and the clerk shall extend the same upon the tax rolls for the purpose of taxation, and the same shall, thereupon, become subject to taxation the same as other lands and the taxes assessed thereon collected and enforced in like manner as against other lands; Provided, however, that the purchaser, at a tax sale of any such lands sold for delinquent taxes shall only acquire, by virtue of such purchase, such rights and interest as belong to the holder and owner of the certificate of sale issued by the Commissioners of the Land Office under the provisions of this act and the right to be substituted in the place of such holder and owner of such certificate of sale as the assignee thereof; and upon a production to the proper officer of a tax certificate given upon such tax sale, in case such lands have been redeemed, such tax purchaser shall have the right to make any payment of principal or interest then in default upon such certificate of sale as the assignee thereof. But no tax deed shall be issued upon any tax certificate procured under the provisions of this act while legal title of said lands remains in the State of Oklahoma. Whenever a certificate for the sale of any of said lands has been cancelled, it shall be the duty of the Commissioners of the Land Office to notify the clerk of the county in which such lands are located of said cancellation and thereafter such lands shall not be listed for taxation but in the event of redemption of any such lands the party making such redemption shall pay as taxes and in addition to all other charges an

amount equal to the taxes last levied thereon for each year such land was not listed for taxation together with such interest and penalty as would have been charged if the same had been regularly listed and taxed.

Section 4. Said lands and improvements thereon shall be sold under the appraisement of the year 1908, made and returned to the Commissioners of the Land Office; Provided, that in the event it shall appear the said land or improvements have not been properly appraised, the Commissioners of the Land Office shall have the power to order and provide for a new appraisement; Provided, further, the Commissioners of the Land Office shall notify the lessee before such land is offered for sale of the appraised value of his improvements and should any such lessee be dissatisfied with the appraised value of his improvements, said lessee shall within thirty days from notice thereof, notify the Commissioners of the Land Office in writing; whereupon the land covered by said lessee's contract shall be reserved from sale, pending a review of the appraisement made by the said Commissioners of the Land Office in the district court of the county in which said land is located. An appeal from the Board of Appraisers may be taken as provided in "An Act amending section 28 of article 9, chapter 17, of the Statutes of Oklahoma, 1893, and regulating the method of procedure in the condemnation of private property for both public and private uses," approved May 20, 1908; and the procedure of such appeal and the review and demand for jury trial in said court shall conform to the procedure therein set forth; and pending the termination of said appeal the lessee shall be entitled to remain in possession of said property, paying therefor as rental five per centum of the appraised value of said land upon which said improvements are located; Provided, however, in addition to that which is herein stipu-

lated, there shall nowhere be a meaning of any or all of the provisions or of the sections of this act, collectively or several(ly), so construed as to extend to any lessee the preference right of purchase to any of the lands withdrawn from homestead entry and granted to the state under and by virtue of section 12 of the Enabling Act.

Section 5. The state shall have first lien upon all lands sold under this act, together with all improvements and appurtenances thereunto belonging until all payments, both principal and interest, are made thereon, and upon such payments being made, the Commissioners of the Land Office in forms of law shall execute to each purchaser as in this act provided, a patent in fee simple; Provided, a certificate of purchase reciting the conditions of such purchase shall be issued to every purchaser under this act immediately upon execution of the contract of purchase and such certificate of purchase shall be entitled to record, as evidence of the same, under the provisions of the law of conveyance.

Section 6. If the lessee of any tract of land sold by the state shall not become the purchaser of the lands leased by him, he shall retain possession of any portion of said land upon which he shall then have growing crops until he shall have sufficient time to mature, harvest and remove same from such land; Provided, no extension of such time of possession shall extend longer than the thirty-first day of December, after the sale thereof.

Section 7. Upon the sale of such lands as provided herein, if any lessee having "preference right" to purchase as provided herein, fails or refuses to pay the highest *bona fide* bid thereon, then upon said lessee's fixing a date at which time he will surrender possession of said property the purchaser will pay to the Commissioners of the Land Office, or their authorized agent, to reimburse the lessee

having such preference right, the appraised value of all such improvements (as defined in section 4) and all purchasers of land sold under this act shall pay to said Commissioners or their authorized agent the appraised value of all the improvements upon said land to reimburse the lessee having such preference right to said value; and upon possession being given by the lessee, the Commissioners of the Land Office shall immediately pay to him the value of all such improvements paid to them by such purchaser.

Section 8. In addition to the value of the improvements, five per cent of the purchase price of the land shall be paid at the time of the sale, except where the land sells for less than one thousand dollars, in which case the initial payments shall be fifty dollars on any quarter section. The remainder of the purchase price may be paid in forty equal annual payments with the interest at the rate of five per cent per annum; Provided, that after the expiration of five years, the purchaser may, at the time of any interest payment, pay any or all deferred payments, both principal and accrued interest; Provided, the purchaser shall not be permitted to sell the land so purchased until the end of five years from the date of purchase to any person or persons owning more than one section according to the United States survey; Provided, as a further condition herein required of purchasers under the provisions of this act, the purchaser of any land, sold under the provisions of this act, shall be required to establish and maintain valuable, lasting, permanent improvements other than fencing, together with tillage of same upon lands so purchased, and if the land purchased is grazing land he shall be required to establish and maintain valuable, lasting, permanent improvements, other than fencing only, thereon, before he shall acquire title from the state to any of the land so purchased; and purchas-

ers of said land shall be limited in purchase of said lands to said lands, and shall not exceed the above mentioned maximum amounts, respectively, of either agricultural or grazing lands; and such purchaser shall take such land, subject to such restrictions and conditions. Violations of this provision shall work a forfeiture of said lands, together with all appurtenances thereunto belonging, and the same shall then escheat to the state upon proof of a violation of the conditions herein provided; Provided, whenever the holder of any certificate of purchase of any state or school lands shall surrender the same to the Commissioners of the Land Office with the request to have the same divided into two or more certificates, it shall be lawful for the commissioners to issue the same; Provided, further, that no new certificate shall issue while there is due and unpaid any interest, principal or taxes on the principal certificate of same when in any case where the Commissioners of the Land Office shall be of the opinion, after an examination of the land if necessary, that the security would be impaired and endangered by the proposed division, and for all new certificates a fee of one dollar for each certificate so issued shall be paid by the applicant; each fee shall be a part of the expense fund of the Commissioners of the Land Office.

Section 9. Any purchaser of lands under the provisions of this act shall have the right to transfer or assign all his right, title and interest in and to such lands, and such assignment shall be in form and executed and acknowledged as required under the laws governing conveyances; Provided, before delivery of patent, such assignment, to be valid, shall be duly recorded in a proper book kept for that purpose by the commissioners of the Land Office; Provided, further, that where the purchaser

of such lands has a husband or wife such husband or wife shall join in the assignment of any such contract.

Section 10. All purchasers, lessees, or holders of any of the public lands of this state, shall take the same, subject to the conditions of this act; and all certificates, contracts or written evidence issued to any purchaser shall recite that the same is taken and accepted subject to all the conditions of this act or any act amendatory hereof.

Section 11. All lands shall be sold at public auction at the door of the county court house, wherein county court is held of the county wherein such land is situated, and shall be sold under such rules and regulations as the Commissioners of the Land Office may prescribe, not inconsistent with the provisions of this act; Provided, that none of the said lands shall be sold for less than its appraised value. Each bidder shall deposit with the Commissioners of the Land Office, or its authorized agent, cash or its equivalent, before making his bid, to the value of ten per centum of the lessee's improvements, and no additional deposit shall be required until the applicant shall obtain same tract of land applied for, and the lessee shall then and there, either in person or agent, and before the next tract is offered for sale, exercise his election of taking such land at the highest bid and complying with the requirements of the purchase thereof or receive the appraised value of his improvements as provided herein; Provided, that if no bid shall be made, the lessee may take said land at the appraised value. Such sale shall not be made in more than one county in the same week.

Section 12. Before selling the lands herein authorizes to be sold the Commissioners of the Land Office shall advertise the fact that such sale will be had, by the publication in three issues in at least

three agricultural journals of national circulation, also in one newspaper of a general state circulation, within the State of Oklahoma, and also in one county paper of general circulation within the county in which any of such lands are located. Such notice shall state the terms and conditions of such sale, and the amount of lands to be sold, and shall also state that full and complete description of each tract can be had by application to the Commissioners of the Land Office of Oklahoma; Provided, also, that the said Commissioners shall, in addition to such advertising, have printed in pamphlet form for free distribution, a complete list of the said lands by counties and townships, giving a description in brief of each tract with the improvements thereon, setting out the separate appraisements of the same.

Section 13. Before any certificate of purchase is issued for any part or parcel of the public lands of this state, the purchaser thereof shall make an affidavit that the land purchased is for his own use and benefit and not either directly or indirectly for the use and benefit of any other person or persons, firm, association, or corporation. In the event that such purchaser fails or refuses to fully comply with all the requirements of the law and the rules and regulations of the Commissioners of the Land Office, authorized by law, governing sales of the land sold under the provisions of this act and make such affidavit, the deposit required in section 11 hereof, shall be forfeited to the state for the benefit of the fund for which the land is sold.

Section 14. The Commissioners of the Land Office shall reserve from sale, as in the foregoing section provided, any lands lying near or within the limits of any city, town or place, which may have a greater value than for farming purposes, by being platted and sold as town lots, acreage tracts, or

public parks; and said commissioners shall cause said lands to be surveyed, platted, appraised and sold at public auction for such purposes, and the lessee shall have the preference right to buy at the highest and best bid. All purchasers shall immediately pay to the Commissioners of the Land Office ten per cent of the amount of the purchase price; The balance shall be paid in ten equal annual payments, same to bear interest at five per cent per annum, payable annually; Provided, the purchaser shall have the privilege of paying any or all deferred payments, with all accrued interest thereon any date after two years from date of purchase. Failure to make payment for six months after any payment and interest accrued thereon shall have become due and payable, as provided in this section, shall forfeit to the common school fund of the state or the institution or the fund to which such land may belong, any such lot, together with all appurtenances thereunto belonging and all payments made thereon, and said lot so forfeited shall be resold, together with the improvements thereon at public action on such terms as hereinbefore provided; Provided, further, all tracts of lands embraced in sections numbered thirteen (13), sixteen (16), and thirty-six (36), and otherwise herein reserved from sale under the provisions of this act, that are platted or laid out for townsite purposes, that are occupied, and that are under lease directly from the Territory or State of Oklahoma, shall also be sold as provided for tracts aforementioned in this section, so reserved and sold under the provisions of this act.

Section 15. All the lands not leased, described and enumerated in section 1 of this act, shall be opened for sale immediately upon the appraisalment of the same as provided in this act and by law, and all of said lands offered for sale under the provisions of this act that are leased shall be sold upon


the expiration of each lease contract, or sooner upon petition of lessee to the Commissioners of the Land Office, asking for sale of any of said lands so leased.

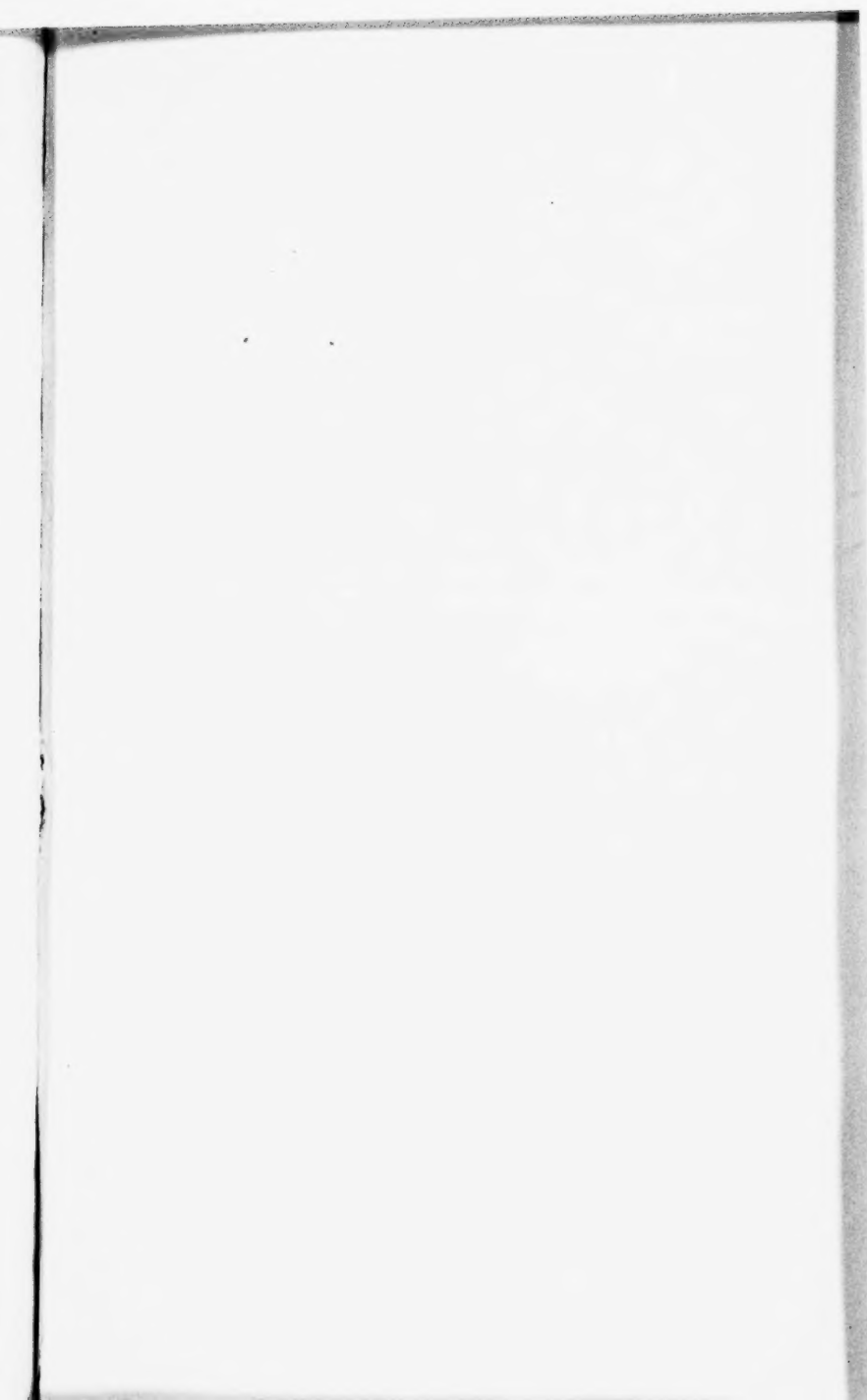
Section 16. The Commissioners of the Land Office shall prescribe forms of oaths and rules to govern applications to buy such lands, and any other rules not inconsistent herewith, to carry out the provisions of this act. Any applicant to purchase land, or any other person who shall knowingly make any false affidavit touching the sale of said lands or knowingly swear falsely in relation thereto, shall be guilty of false swearing and upon conviction be punished by confinement in the penitentiary for not more than three years.

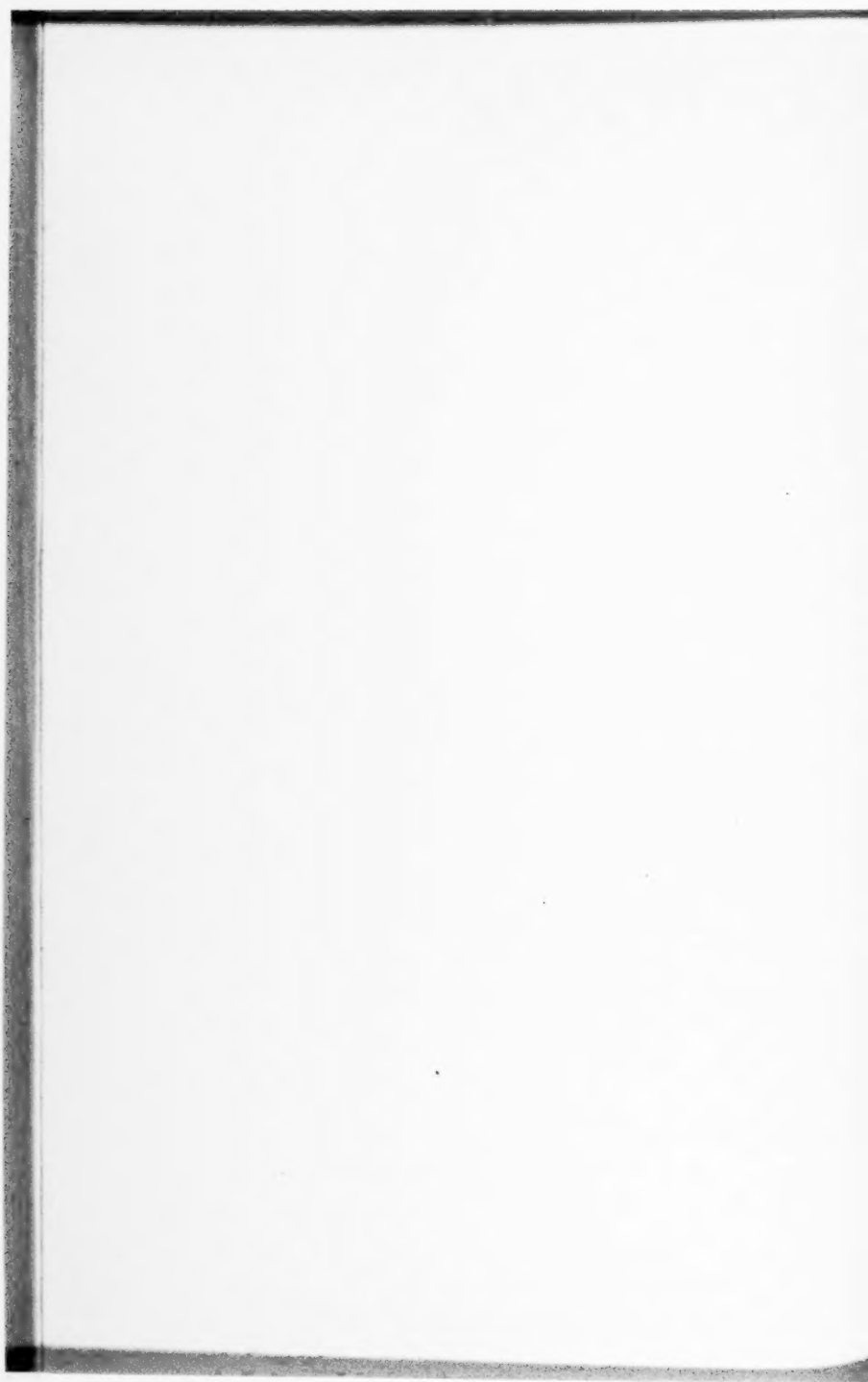
Section 17. Any willful violation of this act by any member of the Commissioners of the Land Office or by any member of any board of appraisers or by any other officer or agent selected to perform any of the duties required under this act shall constitute a felony, and upon conviction, he shall be punished by imprisonment in the penitentiary for not less than three years, nor more than ten years, and shall be summarily removed from office and forever disqualified from holding any office of honor, trust, or profit under the Constitution or laws of this state.

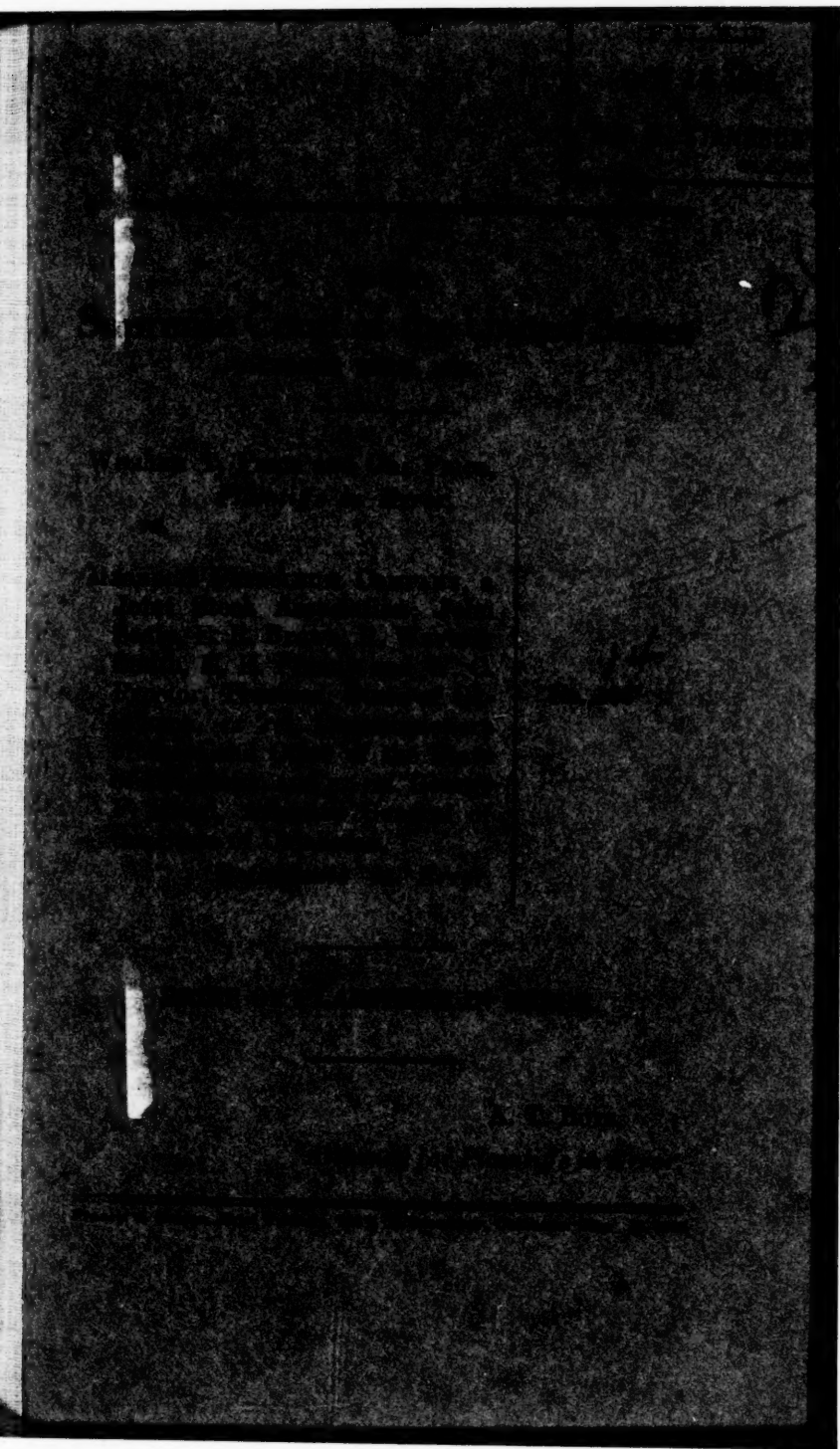
Section 18. All acts and parts of acts in conflict herewith are hereby repealed.

Approved March 2, 1909.









TOPICAL INDEX.

	Page
Amended Petition -----	2
Magnolia Oil and Gas Lease -----	9
Price Lease Dated Jan. 14, 1913 -----	12
Answer to Amended Petition -----	17
Petition of Intervention by State -----	31
Answer to Petition of Intervention -----	37
Replies -----	39
Decree of District Court -----	40
Assignments of Error -----	49
ARGUMENT -----	63
Preference Right Vested at Time of Grant ----	88
Property or Vested Right in Preference Right ..	109
Provisions in a Contract Between Officials Rep- resenting the Government, Concerning Pub- lic Lands and Not Authorized by Law Are Unenforceable -----	113
Subsequent Legislation Effecting the Rights of Lessee Impair the Obligations of Contract ..	114
Oil and Gas Lease in This Case Grants an Estate or Interest in the Lands -----	120
Legislature Cannot Delegate Power Given It by the Enabling Act and the Constitution ----	128
Defendants Are Entitled to Protect Their Pos- session by Injunction -----	138
Price Has Preserved His Rights and Done All Required of Him by Law -----	140
Right to Complete Initiated Title -----	154
The Legislation Made a Contract -----	155
Lessee Title is Ancient Fee Farm -----	158
Oklahoma Supreme Court Opinion -----	160

42013

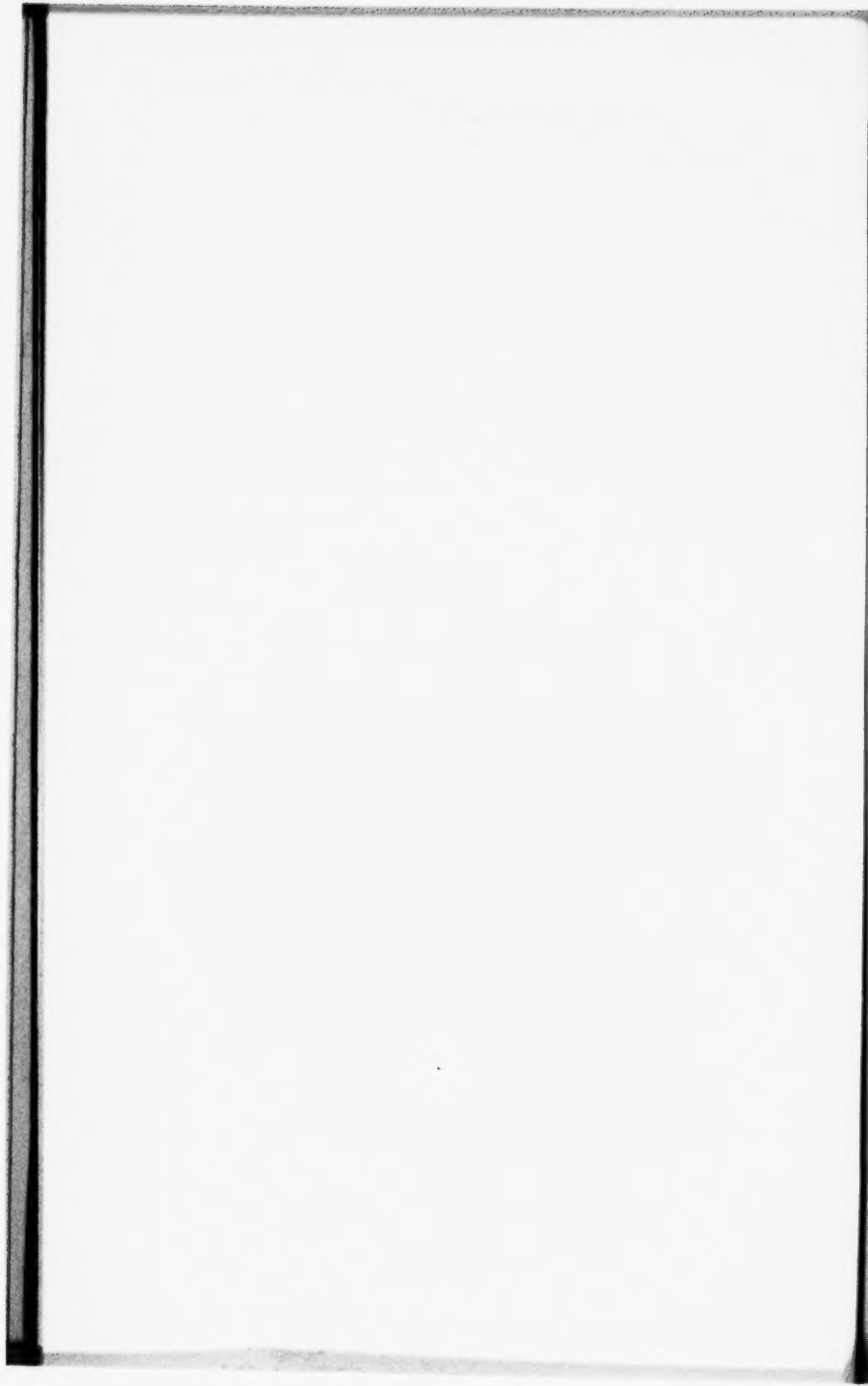
CASES CITED.

	Page
Act of Congress Mar. 3, 1891; 26 Stat. at L. 1043	63
Act of Congress May 4, 1894; 28 Stat. at L., 71	65
Act of Congress June 16, 1906; 34 Stat. at L. (Enabling Act):	
Act of Congress June 16, 1906; 34 Stat. at L.:	
Section 8 -----	67
Section 9 -----	69
Section 10 -----	70
Section 22 -----	71-2
Act of Legislature Feb. 8, 1908, Session Laws 1907-8, 484	
Appraisement Statute -----	74
Act of Legislature May 26, 1908, Session Laws 1907-8, 486	
Segregation Statute -----	75-6
Section 21, same Statute -----	76
Act of Legislature May 26, 1908, Session Laws 1907-8, p. 490	
Segregation and Leasing Stat.-----	77
Act of Legislature Mar. 22, 1909, Session Laws 1909, p. 440	
Lease Statute -----	81
Act of Legislature Mar. 2, 1909, Session Laws 1909, p. 448	
Sales Statute -----	82
Atherton v. Fowler, 96 U. S. 513, 24 L. ed. 732	140-55
Betts v. Com. of Land Office, 27 Okla. 64, 110 Pac. 766 -----	133
Bratton v. Cross, 22 Kan. 674 -----	112
Burke v. So. Pac. Ry., 234 U. S. 669, 58 L. ed. 1527 -----	113

	Page
Burnett v. Sapulpa Refin. Co., 159 Pac. (Okla.) 360 -----	140
Buxton v. Traver, 130 U. S. 232, 32 L. ed. 153---	147
Colo. C. & I. Co. v. U. S., 123 U. S. 307, 31 L. ed. 182 -----	90
Clark v. Frazier, 177 Pac. (Okla.) 589-----	110
Colorado Const., Sec. 10 of Art. 9.	
Davis v. Wiebold, 139 U. S. 507, 35 L. ed. 238---	101
DePeyster v. Michael, 57 Am. Dec. 470-----	159
Del Monte v. Last Chance, 171 U. S. 75, 43 L. ed. 72 -----	155
Douer v. Richards, 151 U. S. 658, 38 L. ed. 305--	101
Diffenback v. Hawk, 115 U. S. 393, 29 L. ed. 423	101
Earhart v. Boaro, 113 U. S. 527, 28 L. ed. 1113--	155
Ervien v. U. S., 251 U. S. 41, 64 L. ed. 128-----	137
Frisbie v. Whitney, 9 Wal. 187, 19 L. ed. 668----	141
Green v. Robinson, 210 S. W. (Tex.) 498-----	101
Graded School Dist. No. 2 v. Trustee, etc., 26 S. W. (Ky.) 8 -----	118
Gould on Waters, Sec. 291 -----	121
Haskell v. Haydon, 126 Pac. 232, 33 Okla. 578--	135
Haws v. Victoria, etc. Co., 160 U. S. 303, 40 L. ed. 436 -----	155
Hoyt v. Fixico, 175 Pac. 517 -----	124
Hutchins v. Low, 15 Wal. 77, 21 L. ed. 82-----	144
Lytle v. State of Ark., 9 How. 333, 13 L. ed. 153--	146
Minnesota v. Batchelder, 68 U. S. —, 1 Wal. 109, 17 L. ed. 551 -----	156
Miller v. Crissman, 73 Pac. 1083 -----	155

	Page
Noel v. Barrett, 18 Okla. 304, 90 Pac. 12.....	109-10
Nat. Oil Co. v. Teel, 95 Tex. 586, 68 S. W. 579..	123
New Eng. Oil Co. v. Congdon, 92 Pac. 180.....	155
Ohio Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729	120-1
Oklahoma Constitution, Sec. 28 of Schedule....	71-2
Oklahoma Constitution, Sec. 1, Article 11.....	72
Oklahoma Constitution, Sec. 4, Article 11.....	72-3
Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363	114, 140, 156-7
People ex rel. Carrell v. Bell, 237 Ill. 332.....	122
Payne v. Cen. Pac. Ry. Co., 255 U. S. 228....	140-150
Payne v. New Mexico, 255 U. S. 367	152
Rule 8 of Secretary of Interior.....	64
Shaw v. Kellogg, 170 U. S. 312, 42 L. ed. 1050..	93
Saunders v. LaPurusima Gold M. Co., 57 Pac. (Calif.) 656	101
Schwab, Co. Treas., v. Wilson, 84 Pac. (Kan.) 124	138
Slusher v. Simpson, 67 S. W. 380, 23 Ky. Law Rep. 2252	112
State ex rel. Brown v. McPeak, 47 N. W. 691..	115
State ex rel. v. Thayer, 64 N. W. 700.....	116
State ex rel. Miller v. Buttzville St. Bk., 114 N. W. (N. D.) 105	117
State v. Richman Ry. Co., 73 N. C. 526, 21 Am. Rep. 473	118
State ex rel. v. Millam, 96 N. W. (N. Dak.) 310	137
So. Oil Co. v. Colquit, 69 S. W. 169.....	123
Tex. Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717	120

	Page
Territory of Okla. v. C. O. & W. Ry., 20 Okla. 663, 95 Pac. 420 -----	156
Twigg v. State Bd. of Land Co., 75 Pac. 729----	111
Thornton on Oil and Gas, Sec. 19-----	121
Thornton on Oil and Gas, Sec. 20 -----	121
U. S. v. Iron, Silver Min. Co., 128 U. S. 673, 32 L. ed. 571 -----	91
Union Pac. Ry. Co. v. Karger, 169 Fed. 459----	155
Union Pac. Ry. Co. v. Douglass, 31 Fed. 540----	155
Union Pac. Ry. Co. v. Harris, 215 U. S. 386, 54 L. ed. 246 -----	155
Wyoming v. U. S., 255 U. S. 489 -----	154 95
Wing v. Dunn, 127 S. W. 1101 -----	112, 117
White v. Douglas, 41 Pac. (Calif.) 860-----	112
Walpole v. Bd. of Land Com., 163 Pac. (Colo.) 848 -----	114, 128
Washington & Idaho Ry. Co. v. Osborne, 150 U. S. 103, 40 L. ed. 356 -----	155
Work v. U. S. ex rel. McAlester Edwards Coal Co. (not officially reported), 67 L. ed. 640	112



Supreme Court of the United States

OCTOBER TERM, 1923.

WILLIAM T. PRICE and ORA PRICE,

Plaintiffs in Error,

vs.

MAGNOLIA PETROLEUM COMPANY, a
Joint Stock Association; John
Sealy, E. R. Brown, R. Waverly
Smith, E. E. Plumly and W. C.
Proctor, Trustees; State of Ok-
lahoma, *ex rel.* Commissioners
of the Land Office of the State
of Oklahoma, and *ex rel.* George
F. Short, Attorney General of
the State of Oklahoma,

Defendants in Error.

No. 106

BRIEF OF PLAINTIFFS IN ERROR.

ABSTRACT OF THE RECORD.

This action is brought in this Court upon a writ of error to the Supreme Court of the State of Oklahoma, by the plaintiffs in error, William T. Price and Ora Price vs. Magnolia Petroleum Company, a joint stock association; John Sealy et al., as its Trustees, and the State of Oklahoma, *ex rel.* Commissioners of

the Land Office, and *ex rel.* S. P. Freeling, attorney general of the State of Oklahoma.

The petition for writ of error appearing, Record, pages IV. to VII.

Order allowing writ of error, appearing page VII.

Writ of error appearing pages IX.-X.

Citation to defendant and service thereof, appearing Record pages 1-11.

Return of writ, appearing Record page 1.

Assignment of error, appearing Record pages 203-213.

The defendant in error, the Magnolia Petroleum Company, filed its petition for injunction in the District Court of Stephens County, Oklahoma, on the 25th day of May, 1920 (Record, pages 4-7), and thereafter filed their amended petition, appearing Record, pages 8 to 26. On the ---- day of November, 1920. On this amended petition the case was tried. The material parts of the petition are as follows:

“AMENDED PETITION.

“First. That the State of Oklahoma is the

owner of the following described real estate situated in Stephens County, Oklahoma, to wit:

“The Northeast Quarter of Section 33, Township 1 South, Range 8 West,

and that on the 4th day of January, 1919, said State of Oklahoma, acting by and through the Commissioners of the Land Office of the State of Oklahoma, made, executed and delivered to the plaintiff an oil and gas mining lease on the above described land. A copy of said oil and gas mining lease is attached to this petition and made a part of the same and marked plaintiff's ‘Exhibit A.’

“Second. Plaintiff alleges that said defendants, William T. Price and Ora Price, are in possession of said premises, using the same for agricultural purposes; that on the 22nd day of March, 1916, the State of Oklahoma, acting by the Commissioners of the Land Office of the State of Oklahoma, made, executed and delivered to said defendants an agricultural lease on the above described premises for a term of five years. A copy of said agricultural lease in blank is attached to this petition and made a part of same and marked plaintiff's ‘Exhibit B.’

“Third. Plaintiff alleges that heretofore, to wit, on the 26th day of August, 1915, the Commissioners of the Land Office of the State of Oklahoma, in a regular duly held session in the office of the Secretary of State, at Oklahoma City, made and had the following proceedings in *re.* segregation of land for oil and gas purposes:

“The Secretary presented the following recommendation to the board for approval:

“ ‘Whereas, we have had offers from reputable parties to place oil and gas bids on the following

unsegregated school lands, I hereby recommend that the following described lands be segregated for oil and gas purposes, and that they be advertised for bids for leasing * * * the Northwest Quarter of Section 33, Township 1 South, Range 8 West, Stephens County, * * *. After discussion by the Board, it was thereupon moved by Mr. Lyon and seconded by Mr. Howard that the above sections and quarter sections be declared valuable for mineral purposes, and that the same be segregated and withheld from sale.'

"All voted aye and the motion prevailed, and there was duly entered of record in said office their said finding, declaring that such oil and gas character exists, and further declaring that the oil and gas deposits are segregated from the surface use and interest there, and such segregation of such deposits thereby conclusively withhold the same from sale, lease or other alienation, except as provided by the laws of Oklahoma. And thereafter, the said Commissioners, desiring to lease said land for oil and gas purposes to the same extent and in the same manner as a private owner of land in fee could in his own right execute a grant thereto, did duly authorize the advertisement of the said tract for leasing for oil and gas purposes and for bids to be made thereon, and after due advertisement an oil and gas lease thereon was duly sold to the plaintiff herein and a lease duly executed as shown by Exhibit 'B.'

"Fourth. The plaintiff further alleges that under and by the terms of said oil and gas mining lease it has the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas from said above described premises and to occupy and use the same and so much of the surface thereof as may be reasonably necessary to carry on the work

of prospecting for, extracting, piping, storing and removing such oil and natural gas. Also the right to obtain from wells or other sources on said operations (land), except the private wells or ponds of the surface owner or lessee and also the right to use, free of cost, oil and natural gas as fuel so far as necessary to the development and operation of said property.

“The plaintiff further alleges that said premises are in the same section of land as what is known as Empire Well No. 1, which has been recently drilled in that section and which is producing approximately 800 barrels of oil per day and that drilling for oil and gas is being done in all directions from said quarter section of land; that it is necessary, in order to protect the interest of the State of Oklahoma and the rights of the plaintiff under said oil and gas lease, that said above described premises should be developed for oil and gas. That there is a number of wells being drilled for oil and gas in the Southwest Quarter of said section of land, which are down about to the sand expected to be found in that vicinity, and there is also a well being drilled just northwest of said above described premises in which the casing has been set and is expected to be drilled into the sand within a few days. If oil or gas should be found in paying quantities in any of the surrounding wells being drilled, it will be necessary for the plaintiff, under said oil and gas mining lease, to immediately explore and develop said above described premises for oil and gas in order to hold its contract with the State of Oklahoma, and it is, therefore, necessary for the plaintiff to begin operations for the development of said premises at this time and immediately. The plaintiff further alleges that on the 24th day of May, 1920, acting by and through its

duly authorized representatives, it went upon said above described premises for the purpose of making a location for the drilling of a well; that the place it decided to make the location is in the Southwest Quarter of the Northeast Quarter of said Section 33, Township 1 South, Range 8 West, and that the said defendant, William T. Price, objected to the plaintiff going on said premises and making said location, or on any part of said premises and absolutely refused to permit the plaintiff to go on said location or any part of said premises for the purpose of drilling thereon for oil and gas and forbade plaintiff from going on said premises for said purposes and ordered its representatives to keep off the same, and threatened plaintiff and its agent with bodily injury, and by force and violence refused to allow the plaintiff, its agents or employees, to go upon said premises for the purpose of drilling for oil and gas or making any development thereon, or any part of the same. The plaintiff is now ready and desires to immediately begin erecting a derrick on said location above described, and to begin preparation to drill a well thereon and to explore and develop all of said premises for oil and gas. And the plaintiff is being deterred from said action by the acts and conduct of the defendants aforesaid.

The plaintiff further alleges and states that it offered to pay the defendants for any loss or damage that they might sustain by reason of the plaintiff moving on said premises and on said location, to their crops, and to pay them for any labor that they might lose by reason of the plaintiff moving on said location or on said premises, but that the defendants still refused to allow the plaintiff to go upon said premises for the purposes aforesaid.

“Fifth. That after the filing of the original

petition, plaintiff drilled two wells to a depth of about 1700 feet to the oil and gas bearing sand, and discovered oil and gas in paying quantities, and is now producing 120 barrels of oil per day from the said premises and marketing the same, and two other wells are in the course of drilling, one of which has reached the sand, but is not drilled in. That the amount and value of said oil cannot be stated or determined, and that unless plaintiff is permitted to continue the development and production of such oil, it will be subjected to irreparable injury, which cannot be estimated or determined with any accuracy in a proceeding at law, and the defendants would be wholly unable to respond in damages for such damages as would be sustained.

"Sixth. That under and by virtue of the terms of the lease attached to the said petition and marked Exhibit 'A,' the defendants' right terminated and expired on the 31st day of December, 1914, and the defendant, desiring to renew said lease, under and by virtue of said rules adopted by the Commissioners of the Land Office of the State of Oklahoma, by G. A. Smith, Secretary of the Commissioners of the Land Office of the State of Oklahoma, entered into an extension agreement with the said W. T. Price, the defendant herein, by the terms of which the said W. T. Price agreed, among other things, that his lease and right to possession of said land, and interest therein, should be subject to all the laws of the State of Oklahoma which are now or may hereafter be in force and effect, and which may hereafter be passed. A copy of the said extension agreement, duly executed by said defendant, is hereto attached and marked Exhibit 'C' and made a part hereof; that thereafter, under the laws of said State as hereinbefore stated, the said Northeast Quarter of Sec-

tion 33, Township 1 South, Range 8 West, was by the Commissioners of the Land Office, designated, set apart, segregated and reserved as mineral, oil and gas lands, as provided by the laws of the State of Oklahoma, and the said W. T. Price was in the possession of said land without any renewal of his former lease, but under the terms and conditions of the said laws and the said extension agreement, and thereby agreed to and consented to such segregation and the action of the said Commissioners of the Land Office in selling the oil and gas rights and in executing the lease to the plaintiff passed all the oil and gas rights to this plaintiff.

“That subsequent to the expiration of said lease and its extension, the defendant continued to occupy said premises, holding over from year to year under the rules and regulations of the said Commissioners and the laws of said State, and the Commissioners accepted from time to time the annual rentals and adopted a rule providing that any person who did not execute a new lease, but held over, should be presumed to hold over under the terms and conditions of the old lease and the extension thereof and the rules and regulations of the Commissioners and the laws of the said State, and such rules and regulations were known to the defendant and he held over subject to their terms and conditions.

“That in 1916, as required by law, the Commissioners were required to appraise said land, and appraised the same and fixed the rentals at \$95.00 a year and the said defendant recognizing the rules and regulations and law authorizing such appraisal and increase of rentals, paid since 1916, \$95.00 a year, each year, rental for said land.

"Seventh. The plaintiff further alleges that it has no adequate, speedy or sufficient remedy at law, and that the defendants are not able to respond in damages to the plaintiff for their acts and conduct as aforesaid.

"Wherefore, the plaintiff prays the Court for a permanent order, enjoining the defendants, and each of them, from in any manner interfering with the plaintiff in its drilling operations or other operations or explorations on said premises for oil and gas, and that a day be set for this Court for a hearing on this petition and that, pending a hearing of this petition for said permanent injunction, the plaintiff prays for a temporary injunction order restraining the defendants from interfering with the plaintiff in going upon said premises and making preparation to drill wells for oil and gas or in drilling wells thereon for oil and gas or in any manner interfering with the plaintiff in operating for oil and gas and developing the same as aforesaid under said oil and gas mining lease.

"That said restraining order be immediately issued by this court and that the costs of this proceeding be taxed against the defendants.

"WOMACK & BROWN,

"BLAKNEY & MAXEY,

"Attorneys for Plaintiff."

"EXHIBIT 'A.'

"THE STATE OF OKLAHOMA.

"Oil and Gas Mining Lease.

"T-162.

"This indenture of lease, made and entered into in duplicate on this the 4th day of January, A. D.

1919, by and between the Commissioners of the Land Office of the State of Oklahoma, acting for and in behalf of the State of Oklahoma, parties of the first part, hereinafter designated as lessor, and Magnolia Petroleum Company, John Sealey, E. R. Brown, R. Waverly Smith, E. E. Plumly and Geo. C. Greer, as Trustee, Box 1667, of Dallas, Texas, party of the second part, hereinafter designated as lessee, under and in pursuance of the provisions of the Constitution and laws of the State of Oklahoma relating to the segregation of the oil and gas deposits and the leasing thereof on school and other public lands belonging to the State of Oklahoma, witnesseth:

“1. The lessor, for and in consideration of eight thousand (\$8,000.00) dollars, the receipt whereof is hereby acknowledged, and the royalties, covenants, stipulations and conditions hereinafter contained and hereby agreed to be paid, observed and performed by the lessee, and his lawful assigns, *does hereby demise, grant, lease and let unto the lessee for the term of five years from the date hereof, and as long thereafter as oil or gas or either of them is produced in paying quantities, all the oil deposits and natural gas in or under the following described tract of land lying and being within the County of Stephens, in the State of Oklahoma, to wit:*

“The Northeast Quarter of Section Thirty-three (33), Township One (1) South, Range Eight (8) West of the Indian Meridian,

and containing 160 acres, more or less, with the exclusive right to prospect for, extract, pipe, store and remove oil and natural gas, and to occupy and use so much only of the surface of said land as may reasonably be necessary to carry on the work of prospecting for, extracting, piping, storing and removing

such oil and natural gas. Also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, except the private wells or ponds of the surface owner or lessee, and also the right to use, free of cost, oil and natural gas as fuel as far as necessary to the development and operation of said property.

"2. The lessee hereby agrees to deliver or cause to be delivered to the Commissioners of the Land Office of the State of Oklahoma, or their successors, a royalty of one-eighth part of the oil or gas produced from the leased premises or in lieu thereof pay to the State the market value of said royalty interest, as the Commissioners may elect. All oil and gas due to the State under this contract, shall be delivered by the lessee herein, free of cost, into pipe lines, tanks or cars, or settled or paid for before removing the same from the premises if handled in any other way. The lessee shall furnish to the lessor certified copies of gauge tickets, sales shipments and amount of gross production, at their offices in Oklahoma City. Gas to be metered on the premises under high pressure unless some other method of gauging and metering same shall be hereafter agreed upon by the parties hereto in writing."

Sections 3, 4, 5 pertain to the diligence in the operation of the oil and gas lease and the payment of the rentals in case of no drilling and the forfeiture of the lease in case no drilling or rental is paid and prohibiting the allowance of waste and reserving to the lessee the property placed on the lands

and for the method of accounting for the gas and oil produced.

Section 6 provides for the oil and gas lessee to pay to the *surface owner* or *surface lessee* for all damages or loss accruing to the surface interests in said lands and to all crops and improvements thereon.

Sections 7, 8, 9, 10, 11, 12 and 13 are not material to the issues in this case.

Said oil and gas lease to the defendants in error appears as Exhibit A to plaintiff's amended petition (Record, pages 14 to 19), and is the same exhibit as offered in evidence at the trial of the cause.

Exhibit B attached to defendants in error's amended petition in the trial below, appears of record, pages 20 to 24, inclusive, and omitting the certification, is as follows:

“EXHIBIT B.

“Received Jan. 14, 1913.

“Secretary.

“*Lease for Public Lands of the State of Oklahoma.*

“This lease made by and between the Commissioners of the Land Office of the State of Oklahoma, a Commission having charge of the sale, rental, disposal and management of the school and other public lands of the State of Oklahoma, and acting on behalf

of said State, and hereinafter designated as parties of the first part, and William T. Price of Comanche and hereinafter designated as party of the second part, witnesseth:

“That the said parties of the first part by virtue of the authority vested in them by the Constitution and Laws of the State of Oklahoma and in consideration of the covenants of the said party of the second part hereinafter set forth, hereby *lease and let* unto the said party of the second part the following described public land granted to said State by the Congress of the United States, to wit: The northeast quarter of section 33, township 1 south, range 8 west, of the Indian Meridian in Stephens County, State of Oklahoma, to have and to hold the same for a period of two years from the first day of January, 1913, to and including the 31st day of December, 1914; provided, however:

“This lease is made subject to the rights of the State of Oklahoma to sell and convey the land herein described at any time and that upon such sale, if any be provided by law prior to the expiration of this lease, the same shall thereupon expire, subject to such conditions, limitations, restrictions and exceptions as may be provided by law.

“And as a consideration for the leasing of said land, the said party of the second part hereby agrees to pay to the said party of the first part, as rent therefor, the total sum of one hundred thirty-one and no/100 dollars in installments as follows:

“Sixty-five and 50/100 dollars for the first day of October, 1913; sixty-five and 50/100 dollars for the first day of October, 1914.

“The said deferred payments are evidenced by two certain promissory notes of even date herewith and payable as above specified and signed by said

party of the second part as principal and one qualified person, a resident of said state, as surety.

“And as a security for the payment of the above described notes at the time the same are due and payable, the said party of the second part hereby expressly grants and gives unto the State of Oklahoma a first lien upon all crops and improvements now located, or which may be placed or made upon said land during the term of this lease.

“Said party of the second part may, at the termination of this lease, remove any or all of his improvements, and he shall have the right to harvest or remove any growing crop on said land, provided however, that in case said party of the second part is in default for non-payment of any rental or assessment of any nature, he shall not be allowed to remove such improvements or make such entry to secure crops until all arrearage is fully satisfied, said improvements that are movable shall then be moved immediately within sixty days from termination of this lease.

“If the said party of the second part shall be in default of the annual rental due the state for a period of three months and such delinquency is not paid within thirty days from the time of service of notice of delinquency, the parties of the first part shall declare this lease forfeited as by law provided and the land herein described shall revert to the State of Oklahoma the same as though this lease had never been made; provided, however, in case of forfeiture as provided by Section 6 of Chapter 118, Session Laws of the State of Oklahoma of the year 1910, the party of the second part has the right of redemption by paying all delinquencies, fees and costs of forfeiture at any time before such land is advertised to be leased. The improvements now located or which may hereafter be placed on said

described land in case of forfeiture and reverting of said land to the state as by law provided shall be sold under the direction of the Commissioners of the Land Office at public or private sale, upon due notice to the party of the second part, and the proceeds received therefrom shall inure to the said party of the second party after payment shall have been made to the state for all delinquencies and rents and expenses incurred in making such sale.

“The said party of the second part hereby agrees, binds and obligates himself that he will not cut or remove, or permit to be cut or removed, any timber from said land, that he will not quarry or remove, or permit to be quarried or removed, any building or valuable stone, from said land, that he will not mine or move, or permit to be mined or moved, any minerals therefrom, and that he will not remove or take from said land any sand or gravel or other deposits of like character without first obtaining written authority so to do as by the laws of said state provided. The said party of the second part hereby agrees, binds and obligates, that he is leasing said land for agricultural and grazing purposes and that he will use and occupy the same for no other purposes and that he will care for and cultivate the same in a husbandlike manner and that he will protect said land from waste and that he will not permit or suffer any waste or trespass to be committed on or against said land. The said party of the second part hereby agrees, binds and obligates himself that he will not assign, transfer, or relinquish this lease and his interest therein and his interest in the improvements without the consent and approval of the said parties of the first part, and that he will not sublease or underlet the said land or any part thereof without written per-

mission being first obtained from the said parties of the first part.

“And it is hereby agreed that the said party of the second part shall have the *preference right to re-lease said land* as provided by the laws of said state. If at any time after the execution of this lease it is shown to the satisfaction of the parties of the first part that there has been any fraud or collusion upon the part of the second party to obtain the same, said lease shall be declared null and void at the option of the parties of the first part.

“And it is hereby expressly agreed and understood that a violation of any of the terms of this lease, or the laws of the State of Oklahoma, concerning the public lands of said state by the said party of the second part shall subject this lease to cancellation and upon proof of the violation of any of the terms of said lease or said laws being made to the Commissioners of the Land Office of the State of Oklahoma such Commissioners of the Land Office shall have the right to cancel and declare the same null and void and of no effect and take possession of said premises and re-lease the same as by law provided.

“This lease is executed in duplicate.

“In witness whereof, the said parties have caused their signatures to be subscribed hereto on this 2nd day of January, 1913.

“COMMISSIONERS OF THE LAND OFFICE
OF THE STATE OF OKLAHOMA.

“By Lee Cruce,

“*Chairman.*

“Attest:

“Jno. R. Williams, *Secretary.*

“WILLIAM T. PRICE, *Lessee.*”

To the amended petition the defendants in error, Price, filed on the 18th day of November, 1920, their answer to the amended petition, on which answer the cause was tried. The material parts of the answer being as follows (appearing Record, pages 26 to 52, inclusive):

Answer to Amended Petition.

“Come now the defendants, William T. Price and Ora Price, and for their answer to the plaintiff’s Amended Petition, allege and state:

“FIRST COUNT.

“Defendants allege that the plaintiff is the owner of and interested in pipe lines and transportation of oil and gas, both in Oklahoma and Texas, and is affiliated and confederated with companies and persons engaged in operating pipe lines and transportation of oils and gas both in Oklahoma and Texas, and by reason thereof the plaintiff herein cannot hold an oil and gas lease upon the public lands in the State of Oklahoma, and that any purported lease upon the northeast quarter ($\frac{1}{4}$) of section thirty-three (33), township one (1) south, range eight (8) west of the Indian Meridian to the plaintiff is, for that reason, null and void.

“SECOND COUNT.

“1. Defendants deny each and every allegation therein contained, excepting such as are hereinafter specifically admitted.

“2. Defendants deny that the State of Okla-

homa is the absolute owner of the northeast quarter ($\frac{1}{4}$) of section thirty-three (33), township one (1) south, range eight (8) west, and alleges that the title of the State of Oklahoma and of these defendants is as hereinafter set out.

“3. That under and by virtue of the Acts of Congress the President of the United States was authorized and empowered from time to time to reserve and set aside for the Territory of Oklahoma, and other territories, certain lands for public schools, penal institutions and public buildings, and that the President of the United States did set aside for such purposes sections 16 and 36 and sections 13 and 33, in Oklahoma Territory, and that under and by virtue of the Act of Congress approved June 6, 1900, 31 Stat. L. 680, Congress did set aside, together with other lands, section 33 for the Territory of Oklahoma and the future State of Oklahoma, and reserved said lands from sale or homestead entry. That said act applies to, and covers the lands involved in this controversy.

“4. That under and by virtue of the Acts of Congress, and the Rules and Regulations of the Department of the Interior, prior to statehood, the Honorable Governor of the Territory of Oklahoma, the Honorable Secretary of the State of Oklahoma, and the Honorable Superintendent of Public Instructions of the Territory of Oklahoma were constituted a board for the leasing of public lands in the Territory of Oklahoma, and under and by virtue of said Act of Congress and said Rules and Regulations of the Secretary of the Interior and the laws in force at said time said board did execute leases to the public lands within th Territory of Oklahoma, and on that tract of land involved in this controversy, as hereinafter shown by leases set out.

“5. That under and by virtue of an Act of Congress approved June 16, 1906, commonly known as the Enabling Act, Section 33, together with other lands in the territory comprising Oklahoma Territory and including the lands in controversy, were granted to the State of Oklahoma upon certain conditions, limitations and covenants with respect to their disposition and sale.

“6. That under and by virtue of Section 10 of said Act of Congress approved June 16, 1906 (commonly known as the Enabling Act), provision is made for the sale of Sections 13 and 33, including lands in controversy, and giving to the lessee the Preference Right to purchase in the following language, to wit:

“‘Preference Right to purchase at the highest bid being given to the lessee at the time of such sale.’

“Said Act also provides that the Rules and Regulations for the sale of said land shall be as prescribed by the Legislature of said state, and also provides for the appraisement of said lands by three disinterested appraisers, non-residents of the county wherein said lands are situated, and the said appraisers so designated are required to make a true appraisement of said land at the actual cash value thereof, exclusive of improvements, and separately appraise the improvements at their fair and reasonable value, and that no sale shall be had for less than the appraised value of the land. That said Section 10 is as follows, to wit:

“‘That said sections thirteen and thirty-three, aforesaid, if sold, may be appraised and sold at public sale, in one hundred and sixty-acre tracts or less, under such rules and regulations as the legislature

of said state may prescribe, preference right to purchase at the highest bid being given to the lessee at the time of such sale, but such lands may be leased for periods of not more than five years, under such rules and regulations as the legislature shall prescribe, and until such time as the legislature shall prescribe such rules, these and all other lands granted to the state shall be leased under existing rules and regulations, and shall not be subject to homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for designated purposes only, and until such time as the legislature shall prescribe as aforesaid said land shall be leased under existing rules; *Provided*, That before any of the said lands shall be sold, as provided in Sections nine and ten of this Act, the said land and the improvements thereon shall be appraised by three disinterested appraisers, who shall be non-residents of the county wherein the land is situated, to be designated as the legislature of said state shall prescribe, and the said appraisers shall make a true appraisal of said lands at the actual cash value thereof, exclusive of improvements, and shall separately appraise all permanent improvements thereon at their fair and reasonable cash value, and in case the leaseholder does not become the purchaser, the purchaser at said sale shall under such rules and regulations as the legislature may prescribe, pay to or for the leaseholder the appraised value of said improvements, and to the state the amount bid for the said lands, exclusive of the appraised value of improvements; and at said sale no bid for any tract of land less than the appraisalment thereof shall be accepted.'

"7. Section 22 of said Act approved June 16, 1906, commonly known as the Enabling Act, re-

quired the Constitutional Convention of the State of Oklahoma to irrevocably accept the terms and conditions of this Act as follows, to wit:

“That the Constitutional Convention provided for herein, shall, by ordinance irrevocable, accept the terms and conditions of this Act.’

“8. That thereafter and pursuant to the requirements and the privileges granted under the Enabling Act, the people of the proposed State of Oklahoma held their Constitutional Convention and said Constitutional Convention, duly assembled in said State of Oklahoma; did, on the 22nd day of April, 1907, pass the following ordinance, irrevocably accepting the terms, conditions and limitations of the Enabling Act in the following language, to wit:

“‘Be it ordained by the Constitutional Convention for the proposed State of Oklahoma, that said Constitutional Convention do, by this ordinance irrevocable, accept the terms and conditions of an Act of the Congress of the United States, entitled, “An Act to Enable the People of Oklahoma and the Indian Territory to form a Constitutional and State Government and be admitted into the Union on an equal footing with the original states; and to enable the people of New Mexico and Arizona to form a Constitution and State Government and be admitted into the Union on an equal footing with the original states.” Approved June the sixteenth, *Anno Domino*, nineteen hundred and six.’

“9. And that the said Constitutional Convention did adopt and the people thereafter ratified the said Constitution by accepting all grants of land and donations made to the said proposed state by the United States under the Enabling Act for the

uses and purposes and particularly Section one of Article eleven of said Constitution, in the following language, to wit:

“ ‘The state hereby accepts all grants of land and donations of money made by the United States under the provisions of the Enabling Act, and any other Acts of Congress, for the uses and purposes and upon the conditions, and under the limitations for which the same are granted or donated; and the faith of the state is hereby pledged to preserve such lands and moneys and all moneys derived from the sale of any of said lands as a sacred trust, and to keep the same for the uses and purposes for which they were granted or donated.’ ”

“10. The defendants further allege that under and by virtue of the Act of Congress approved May 4, 1894, the Rules and Regulations adopted by the Secretary of the Interior, the Honorable Thomas B. Ferguson, Governor, and William Grimes as Secretary, and L. W. Baxter as Superintendent of Public Instructions, all of the Territory of Oklahoma, constituting the Board for leasing land reserved for school and public buildings in the Territory of Oklahoma, did make and enter into a certain lease contract with one William T. Click on the 8th day of January, 1902, covering the Northeast Quarter of Section Thirty-three (33), Township One (1) South, Range Eight (8) West, and covering a period of time from the first day of January, 1902, to the first day of January, 1905; a copy of said lease contract is hereto attached, made a part hereof and marked defendant's ‘Exhibit A.’ ”

Sections 11 to 20, inclusive, of the amended answer are allegations of the execution and delivery

of various preference right leases issued by the School Land Commissioners to Price and his predecessors in title, the first one being executed on the 8th day of January, 1902, down through to Price.

“21. Defendants further allege that at the time of the passage of the Enabling Act and approval thereof, to wit, on June 16, 1906, and at the time of the adoption of the Constitution of the State of Oklahoma, and for more than ten years thereafter, the said lands hereinbefore described were not known or classed as mineral lands.

“22. Defendants further allege that by virtue of the provisions of Section 1 of Article 4 of Chapter 49 of the Acts of the Legislature for the Session of 1907-1908, and others acts, the Commissioners of the Land Office of the State were required to set aside such lands as were known to be mineral in character, and to segregate the minerals from the surface use and interest therein.

“Said defendants allege and state that said acts if applied so as to segregate the minerals including oil and gas in the lands hereinbefore described so as to deprive the defendants of their Preference Right to purchase said land and all thereof, would be unconstitutional and void as to them insofar as it attempts to take away from these defendants such Preference Right to purchase said interest. And would be violating the provisions of the Constitution of the United States of America in depriving these defendants of their property without due course of law. That said Section 1 reads as follows:

“ ‘When any tract of the school land and other public lands granted to the State of Oklahoma under

the Act of Congress known as the "Enabling Act" is, by the Commissioners of the Land Office of the State, known to contain oil or gas, or where such lands are, by said Commissioners, deemed valuable for oil and gas purposes, such Commissioners shall enter of record in their office, their finding declaring that such oil or gas character exist, and further declaring that the oil and gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this Act.'

"23. That under and by virtue of Article 2 of Section 28 of the Laws of the State of Oklahoma for the year 1909, approved March 2, 1909, the Commissioners of the Land Office of the State of Oklahoma, were directed by the Legislature to dispose of, sell and convey the lands known as indemnity lands in the State of Oklahoma, and Section 33.

"24. That acting under the provisions of law, said Commissioners of the Land Office did cause the lands hereinbefore described, together with the other lands in said section and in said vicinity to be appraised according to the terms and requirements of the Enabling Act for sale purposes and the lands hereinbefore described were appraised by three disinterested appraisers, non-residents of the county in which said lands are located, at the sum of _____ dollars, and the improvements were appraised at the sum of _____ dollars.

"Defendants further allege that under and by virtue of said appraisal so made, the said Commissioners of the Land Office did advertise and sell the other three quarter sections in said section thirty-three (33) and certain indemnity lands in section

thirty-four (34), in the said township and range, and other lands located in the vicinity of the lands in controversy, but wholly failed and neglected to offer for sale the lands of these defendants, although required by law to do so.

"25. Defendants further allege that at the time of said appraisalment the defendants and their predecessors had improved said lands by reducing the same to a high state of cultivation, fencing the same, building a house and barn thereon, setting out and cultivating for a period of four years an orchard of something over four hundred trees and were occupying said lands at said time as they had been therefore as their homestead and with the intention of making said lands their home.

"26. Defendants further allege that in disregard of the right of the defendants, the said Commissioners, although directed so to do by the Legislature of the State of Oklahoma, failed and neglected since 1909, to cause said lands to be advertised and sold as required thereby and that the defendants have at all times been ready, willing and able to do all things required of them by the Enabling Act in order to prove their title to said lands, and that the Commissioners of the Land Office of the State of Oklahoma, in disregard of the right of these defendants under their said lease, and their right to exercise their privilege of buying said land at the highest bid therefor, did on or about the 4th day of January, 1919, make, execute and deliver to the Magnolia Petroleum Company certain oil and gas mining lease which is attached to and made a part of the plaintiff's Amended Petition; said lease was made to the said Magnolia Petroleum Company without any knowledge or consent upon the part of these defendants, or either of them, and without any cancella-

tion or other disposition of the leasehold by the defendants herein on said lands, and without giving to these defendants any preference right to purchase a lease for oil and gas purposes. That the effect of the giving of said lease and development of said land under said lease for oil and gas purposes would be to denude said lands of a very material part of their value, to deprive defendants of the possession of said lands, the use and occupancy thereof and if said plaintiff is permitted to operate under said lease and drill and operate wells upon said land to the exclusion of the defendants, it would deprive defendants of their preference right to purchase said lands, and will make said land valueless for any purpose except under such oil and gas lease so executed to the plaintiff.

“27. That the defendants have valuable rights in and to said lands under their preference right to purchase the same, and under and by virtue of their right to the use and occupancy of the same, and that the making of said lease deprives these defendants of all of said rights without compensation and in violation of the due process under the Constitution of the State of Oklahoma and the Constitution of the United States of America.

“28. Defendants further allege that the Resolution set out in paragraph 3 of Plaintiff's Amended Petition as having been passed by the Commissioners of the Land Office of the State of Oklahoma, was made without authority of law, and is of no force and effect. That said Resolution was passed without the knowledge of the defendants or either of them, and without any compensation being allowed defendants for their rights and claims in and to the said lands, and such purported action of the said Board was in direct violation of the instruc-

tions and directions made to said Board by law, and by the State of Oklahoma, with respect to the sale and disposition of said lands involved and claimed by defendants. That said resolution deprives defendants of their property without due process of law guaranteed to them under the Constitution of the State and of the United States and impairs and deprives them of the rights granted to them under the Enabling Act.

"29. Defendants further allege that any and all acts of said Board of School Land Commissioners and any and all acts of the Legislature that deprives these defendants or either of them from their Preference Right to purchase said lands, or of their rights in said lands as a homestead, does so without compensation and without due process of law.

"30. Defendants further deny that the purported oil and gas lease granted plaintiff gives it any rights to the possession of said lands, or any part thereof, and that the purported action of said Board is in direct violation of their duty under the law of which the plaintiff herein is charged with notice and deprived these defendants of their rights in and to said lands guaranteed them under and by virtue of the Constitution of the State of Oklahoma and of the United States.

"31. Defendants further allege that at the time of the delivery of the lease and the Extension Certificate thereto, marked 'Exhibit A' and 'Exhibit C,' and attached to plaintiff's Amended Petition, defendants did not thereby surrender their Preference Right to purchase said lands, or the homestead character of said lands. That the consideration named in said lease was the rental value of the lands at said time, and no amount was by defendants received as a consideration for the re-

lease by defendants of their Preference Right to purchase said lands, and defendants have consistently maintained and claimed their Preference Rights to said lands, and have at all times done all things required by them by law, to hold and perfect their title thereto, and have in good faith at all times maintained their residence as a home thereon, with their family, and cultivated the said lands and built and maintained the permanent improvements thereon. Defendants and each of them have at all times since their purchase of the said rights of the said DeArman to said lands claimed and asserted their Preference Rights to purchase said lands and their homestead rights thereto, and have never at any time surrendered, eliminated, waived or abandoned their said Preference Right to purchase said lands, or their homestead in said lands.

“33. Defendants further allege that Section 3, Article IV, Chapter 49, Session Laws 1907-08, is in violation of the provisions of the Enabling Act and of Section 1, Article 11, of the Constitution, accepting the grants of public land by the United States to the State of Oklahoma, in that it attempts to authorize the leasing of all public lands granted to the state without regard to the time of such lease, and for terms in excess of the period fixed by Section 8 of the Enabling Act, and that the oil and gas lease held by the plaintiff was made in violation of the terms of the Enabling Act accepted by the State Constitution, and in violation of the authority given, or attempted to be given by said Section 3, Article IV., Chapter 49, Session Laws 1907-08, if said section be held valid in itself. And said Section 3 and the act of the said Commissioners in executing said pretended lease to plaintiff, if upheld and enforced, violates the Fourteenth Amend-

ment of the Constitution of the United States as to defendants in that it takes and will have the effect of taking defendants' property without compensation and without due process of law.

"34. Defendants further allege that Articles III. and IV. of Chap. 49, Session Laws 1907-08, approved May 26, 1908, together with the revision of said Statutes as found and contained in Articles III. and IV., Chap. 69, Revised Laws 1910, and all acts amendatory of such original or revised statutes, or which, whether in the form of a revision or amendment, or by new enactment, undertakes to segregate the mineral or oil and gas deposits from the surface uses and interests in Section 33, granted to the State of Oklahoma, by the terms of the Enabling Act, and accepted by Section 1 of Article 1 of the Constitution, for the uses and purposes and upon the conditions, and under the limitations therein contained, and which statutes, or any rule or regulation attempted to be made pursuant thereto, undertake to confer power upon, or to authorize the Commissioners of the Land Office to segregate the minerals, oil and gas deposits on or under such lands from the surface uses and interests therein, and all acts done by the said Commissioners of the Land Office and their officers, agents and employees, or any other officers, agents and employees of the State, acting under or pursuant to such statute, or any purported rules or regulations of such Board of Commissioners, or under color of authority of any statute, rule or regulation and particularly of any statute, rule or regulation, or action of the Commissioners of the Land Office in attempting, on August 26, 1915, as charged in plaintiff's Amended Petition, to declare the land theretofore leased to the defendant, William T. Price, to be valuable for oil and gas purposes and to segregate the oil and

gas deposits belonging thereto and forming a part of such lands in their native state, from the surface uses and interest therein, and withdraw the same from sale, as well as to authorize the leasing of such lands, already leased, for oil and gas purposes, and in making and entering into the lease of January 4, 1919, with plaintiff, and through which it claims the right of entry and title to the oil and gas on the lands theretofore leased to defendant as construed and as applied to William T. Price, and the lands to which he was, by law, given the Preference Right of purchase, is repugnant to and violates not only Sections 2, 7, 15 and 23 or Article 11 of the Constitution of the State of Oklahoma, but the Fourteenth Amendment to the Constitution of the United States, in that such statute and all acts done pursuant thereto, or under color of authority thereof, as construed and applied to defendants deprives the defendants of liberty and property without due process of law and without compensation, and denies to the defendants the equal protection of the laws.

“35. And defendants claim the protection of the Constitution of the United States and the Amendments thereto, and particularly the Fourteenth Amendment, and invokes the vested jurisdiction of the Court, and, in due course, of the Supreme Court of Oklahoma, and, if necessary, ultimately of the Courts of the United States, for protection of the rights of said defendants and each of them and of their liberty and property in the northeast quarter ($\frac{1}{4}$) of section thirty-three (33), township one (1) south, range eight (8) west, in Stephens County, and of their equal protection of the laws, and for due process of law.

“36. Wherefore, defendants pray judgment and ask that plaintiff take nothing by its suit, and

that defendants recover their costs, for injunction cancellation of oil and gas lease, accounting, etc., and general equitable relief.”

That thereafter on the 13th day of December, 1920, the State of Oklahoma, by and through the Commissioners of the Land Office and the Attorney General of the State, served notice upon the plaintiffs in error that they would file a petition of intervention (Record, pages 53-54), and

That thereafter on the 3rd day of March, 1921, said State of Oklahoma, *ex rel.*, the Commissioners of the Land Office of the State, and *ex rel.*, S. P. Freeling, Attorney General of the State, filed their petition of intervention (Record, pages 54-59), the material parts of which are as follows:

“Petition of Intervention.

“Comes now the State of Oklahoma, *ex rel.* the Commissioners of the Land Office of said State, and *ex rel.* S. P. Freeling, Attorney General of said State, George E. Merritt, Law and Executive Clerk of the Commissioners of the Land Office of Oklahoma, and, complaining of the plaintiff and defendants in the above entitled action, for cause of action herein alleges and says:

“That the State of Oklahoma, by virtue of the Enabling Act, creating the State of Oklahoma, and the ordinance accepting the terms of such Enabling Act, and the Constitution of said State, is the owner

of the following described real estate, situate in Stephens County, Oklahoma, to wit:

“The Northeast Quarter of Section 33, Township 1 South, Range 8 West.

“Intervenor further alleges that, pursuant to House Bill No. 414, Article 2, of the Session Laws of 1907-08, the Commissioners of the Land Office proceeded to appoint appraisers, and which said appraisers, as soon as practicable, proceeded to appraise all of the lands granted to the State of Oklahoma, for educational and public building purposes, and did appraise the above described tract of land and file their report in the office of the Commissioners of the Land Office.

“Intervenor further alleges that, pursuant to Senate Bill No. 1, Article 2 of Chapter 28 of the Session Laws of 1909, which authorized the Commissioners of the Land Office to sell and convey the school and other public lands of the State of Oklahoma upon the appraisement for the year 1908, the Commissioners of the Land Office notified the defendant, William T. Price, the lessee then in possession of the above described lands, of the appraised value of his improvements, and the said defendant, William T. Price, being dissatisfied with the appraised value of his improvements, did notify the Commissioners of the Land Office of his dissatisfaction therewith; whereupon the said land covered by said lease contract with the said William T. Price was reserved from sale pending a review of said appraisement.

“Intervenor further alleges that on the date said appraisement was made one William T. Click was the lessee of record of said tract of land and in possession of the same; that during the interval be-

tween the date of said appraisalment of 1908 and the date of notifying the lessee of the above described lands of the appraised value of his improvements, that the defendant, William T. Price, by proper relinquishment and extension certificates, became the agricultural lessee of said lands.

“Intervenor further alleges that the said lands above described were leased lands, and the said defendant, Price, was the lessee of same, and that the said Price did not at any time or has not at any time presented an application or petition for the sale of the said lands, and has not at any time presented a petition to the Commissioners of the said Land Office asking for a sale of the said tract so leased to him.

“Intervenor further alleges that on the 26th day of August, 1915, the said Price was in possession of the said tract and holding the same as an agricultural lessee, as provided by the laws of said State, a copy of which said lease is attached to the plaintiff's Amended Petition, and here referred to and made a part of this petition of intervention, and that on the said date the Honorable Commissioners of the Land Office, acting under the provisions of Senate Bill No. 338, Session Laws of 1907-8, determined that the said land was known to contain oil or gas and was deemed valuable for oil and gas purposes, and did enter of record in their office their finding declaring that such oil and gas character exists, and that the same was valuable for oil and gas purposes, and further declaring that the oil and gas deposits were segregated from the surface use and interest therein, and such segregation of such deposits did conclusively withhold the same from sale, lease or other alienation, except as provided by the said Senate Bill No. 338. A copy of

said order of segregation is incorporated in the plaintiff's Amended Petition, and hereby referred to and made a part of this petition of intervention.

“Your intervenor further alleges that immediately after such segregation it proceeded to advertise and sell a lease upon the said land for oil and gas purposes, and on the 20th day of November, 1918, caused notice to be duly given for sealed bids for the leasing of the said tract of land for oil and gas purposes, subject to a one-eighth royalty reserved to the State, and that on the 31st day of December, 1918, the Magnolia Petroleum Company filed its sealed bid, offering to pay a bonus of \$8,000.00 for an oil and gas lease on said tract of land, and the said bid being duly opened, the consideration of the same was continued until January 4, 1919, and that at a regular session of the said Commissioners of the Land Office, held on the 4th day of January, 1919, the said bid of the Magnolia Petroleum Company was duly accepted and a lease ordered issued therefor to the said plaintiff in this action. And that thereafter, to wit, on the said 4th day of January, 1919, the said Commissioners of the said Land Office of the State of Oklahoma, by R. L. Williams, Governor, and Chairman of said Board, attested by A. M. McKinney, Secretary of the Commissioners of the Land Office, did execute an oil and gas mining lease to the said Magnolia Petroleum Company, John Sealy, E. R. Brown, R. Waverly, Smith, E. E. Plumly and George C. Greer, as trustees, a copy of which said lease is attached to plaintiffs' Amended Petition and here referred to and made a part hereof.

“Your intervenor further alleges that the said defendant, Price, was the owner of an agricultural

lease upon the said tract of land and had no right to and was not possessed of any right, title or claim to the oil and gas under said premises, or any part thereof, and held his agricultural lease upon the said premises, subject to the rights of the State and the State's lessee mining the said premises for oil and gas or other minerals.

"Intervenor further alleges that under and by virtue of the provisions of the said lease, made with the said plaintiff, that it is entitled to one-eighth of the oil or gas produced by and under said royalty interest.

"Intervenor further alleges that the interference by the said defendant with the plaintiff in said cause, in the entering upon the said premises to drill wells, discover and produce oil and gas, prevents the State of Oklahoma, intervenors herein, from receiving its royalty, as in said lease provided, and is thereby causing the said intervenor irreparable injury and damage; that many wells are being drilled in the immediate territory surrounding the said tract, and the said tract will be drained of large quantities of its oil and gas, unless same is properly developed. The extent of such drainage cannot be ascertained or determined.

"Intervenor hereby adopts as a part of this petition in intervention all of the allegations of plaintiffs' Amended Petition and exhibits attached thereto, and makes the same a part hereof as though fully re-written herein.

"Intervenor alleges that under the laws of said State the intervenor is the one entitled to all the oil and gas produced from said tract, except so far as same may be granted under the terms and conditions of the oil and gas mining lease made to the

plaintiff herein, and that the defendants have no interest in any such oil or gas, and are unlawfully and wrongfully asserting any claim thereto, and unlawfully and wrongfully attempting to prevent the intervenor and its lessee, the plaintiff herein, from developing and producing such oil and gas.

“Intervenor further alleges that the said plaintiff, as provided by the laws of said State, has executed a bond and filed the same with the Secretary of the Commissioners of the said Land Office, as required by law, by the terms and conditions of which the said plaintiff stipulated and agreed to pay any damages that may be suffered by the said defendant by reason of entering upon the said tract for the purpose of producing oil and gas, and that the amount so owing to the defendants, damages to their surface and agricultural rights, ought to be ascertained and determined, and the plaintiff be required to pay said amounts to the defendants, as by law provided.

“Wherefore, intervenor prays that the said defendants, and each of them, be enjoined from in any wise interfering with the intervenors and its lessee, the plaintiff herein, in the operation of the said premises for oil and gas, and the development of the oil and gas therein, and the production thereof, and that their claim to any of the oil or gas produced therefrom be adjudged unfounded and invalid, and that the intervenor be adjudged and decreed to be the owner of all oil, gas and other mineral rights therein, subject to leases now made by the said Commissioners or hereafter to be made, under the terms and provisions of the laws of said State, and for such other and further relief as un-

der the premises the intervenor is entitled to, and for costs.

“S. P. FREELING,
“*Attorney General of the State of Oklahoma.*

“GEO. E. MERRITT,
“*Law and Executive Clerk.*”

That thereafter on the 3rd day of March, 1921, plaintiffs in error filed their answer to the petition of intervention (Record, pages 59-61), the material parts of which are as follows:

“*Answer to Petition for Intervention.*

“Come now the defendants, and each of them, and for answer to the petition of intervenors filed upon part of the State of Oklahoma, allege and state:

“1. That pursuant to the stipulation made between the parties in said action said defendants file their amended answer to the petition of plaintiffs as their answer to the petition of intervention by the State of Oklahoma, and make the same a part hereof as though fully set out herein in so far as the same may be applicable to the said petition of intervention.

“2. Defendants deny each and every allegation contained in the said petition of intervention except such allegations as are alleged to be true in said amended answer and admitted to be true herein.

“3. Defendants admit that the State of Oklahoma have recognized defendant, William T. Price, as the lessee of the lands involved from and prior

to the first appraisalment made by the State of Oklahoma for sale purposes in January, 1909, and until this date.

“4. Defendants specifically deny that they did anything that warranted the Commissioners of the Land Office in reserving said lands from sale or refusing to sell the same and allege that the appraisalment of 1909 was duly and regularly approved by the Commissioners and that the defendants at no time availed themselves of the right under the law to appeal from said appraisalment and that said appraisalment became final and conclusive between the parties.

“5. Defendants further allege that subsequent thereto and in 1915, said land again was appraised for said purposes and that said appraisalment was accepted by the defendant, William T. Price, and that said appraisalment became final and no appeal was taken by the said defendants from said appraisalment.

“6. Defendants further state that by reason of the neglect and failure of the Commissioners of the Land Office, the intervenors herein, to sell the land as provided by law and at the time provided by law that the defendants are entitled to relief against said Commissioners, adjudging the defendant, William T. Price, to be the equitable owner of the land in controversy and entitled to a certificate of purchase thereto, and that defendants hereby offer and tender in court, if it should be adjudged by the court that the defendants should do so, the rental on said land for the year 1920, which matured in October, 1920, during the pendency of this action, and the defendants further allege that they are ready, willing and able to purchase said land

and offer and tender to pay in court such amounts of the purchase price as the court may determine to be just and equitable in the premises.

“Wherefore, defendants pray the judgment of the court according to the prayer of the amended answer filed herein, and further pray that they be adjudged to be the equitable owners of said land and the right to purchase said land and for such other and further relief as the court may deem just and equitable.

“STUART, SHARP & CRUCE,

“STEVENS & RICHARDSON,

“BLAKE & BOYS,

“Attorneys for Defendants.”

That thereafter the defendants in error each filed their reply to the answer of the plaintiffs in error, being in the form of a general denial and especially denying that William T. Price has a preference right to purchase said lands (Record, pages 61-62).

Pursuant to these pleadings the court granted leave for the State of Oklahoma to intervene as requested and several motions and demurrers were acted on by the court, which are here immaterial.

Prior to the trial of the cause in the court below, counsel for the respective parties entered into numerous stipulations of fact under an agreement

that either party could offer such parts of the same as such party might desire, subject to any objections or exceptions that the other party might desire to make.

Upon these pleadings so filed in the District Court of Stephens County, Oklahoma, the cause was tried and the trial court, upon these pleadings and the evidence introduced, entered his decree in which he made many findings of fact and conclusions of law and decreed that the plaintiffs in error herein were equitable owners of the land involved. This decree of the trial court was unattacked by opposing counsel in the Supreme Court, except on the legal questions, and I assume that their attitude will be the same in this Court.

In view of the findings of the court it will not be necessary to go into the evidence, except in special instances where it may show the attitude of the State, or to show how well the findings of fact were supported by the evidence. The decree rendered, with the exception of the formal parts and that part which makes the record for appeal from the trial court, is as follows and appears Record, pages 152-159, inclusive:

“(1) That the temporary injunction heretofore issued and continued in said cause was wrongfully issued and continued, and that the same should be dissolved and held for naught.

“(2) That the oil and gas lease held by plaintiff, Magnolia Petroleum Company, executed by the Commissioners of the Land Office on the 4th day of January, 1919, and which is referred to and marked ‘Exhibit A’ to plaintiff’s Amended Petition, is null and void, and of no force and effect as against the defendants herein, William T. Price and Ora Price.

“(3) That the lands in controversy have been leased by the proper authorities of the Territory of Oklahoma since the 8th day of January, 1902, with the preference right to re-lease, all being done under and by virtue of the Acts of Congress and the Rules and Regulations then, and until statehood, in force, and have at all times since statehood been leased by the proper state authorities to the present time, with the preference right to re-lease and preference right to purchase as provided by the Enabling Act and the valid laws of the State of Oklahoma authorizing the sale of public lands.

“(4) That the defendant, William T. Price, purchased the lease and improvements on the lands involved, and the preference right to re-lease and the preference right to purchase the lands involved, during the fall of 1908, and has continuously occupied and held said lands under such preference right lease as provided by the Enabling Act and laws of the state since said date, and that the Commissioners of the Land Office and the State of Oklahoma, have recognized his preference right to re-lease and his preference right to purchase, as pro-

vided by law at all times since the time of the filing and acceptance of the relinquishment from his predecessor in title, L. B. De Arman, on or about the 15th day of October, 1909, to and including the present time.

“(5) That since the said purchase by said Price, he has continuously occupied said land with his family as his homestead and has at all times asserted his claim to title in and to said land.

“(6) That on or about the 12th day of January, 1909, the said lands were appraised under directions of the Commissioners of the Land Office for sale purposes at Three Thousand Dollars (\$3,000.00), and that no appeal was taken from said appraisement by the said William T. Price, and the said appraisement became thereby finally fixed and adjudicated as the true appraised value of said land for sale purposes, and that the said sum of Three Thousand Dollars (\$3,000.00) was the fair and reasonable value of the land, exclusive of improvements, at the time that said lands should have been sold by the Commissioners as provided by the laws of the State of Oklahoma.

“(7) That the Commissioners of the Land Office have wrongfully failed and neglected to sell said land as required of them by the laws of the State of Oklahoma.

“(8) That the said defendant, William T. Price, has at all times been ready, willing and able to comply with any and all provisions of law relative to the purchase of said lands and did demand of the Commissioners of the Land Office and of their agents and representatives entrusted with the sale of said lands, that the same be sold, which was refused.

“(9) That the defendant, Price, was a qualified person under the law to hold a lease to said lands and to exercise his preference right to release said lands and his preference right to purchase the same, and had acquired and now has a vested right in and to said land.

“(10) That the defendant, William T. Price, is the equitable owner of the title to said premises and is entitled to have his record title to the said lands made perfect upon the payment of the purchase price of Three Thousand (\$3,000.00) Dollars as provided by law.

“(11) That the land in controversy was not valuable for minerals, oil or gas, or known to contain oil or gas, prior to discovery thereof in the year 1920, and after the commencement of this action.

“(12) That the defendants, William T. Price and Ora Price, are entitled to an injunction against the plaintiff, the Magnolia Petroleum Company, and against the State of Oklahoma, and the Commissioners of the Land Office of the State of Oklahoma, enjoining them and their successors, and their agents, servants and employees, and their successors in office, from in any way interfering with the possession of the defendants in and to said lands, or interfering in any way with the rights and title of said defendants.

“(13) And the Court finds not only the foregoing facts and issues of fact in favor of defendants herein, but finds all other facts in this cause and issues of law and fact in favor of defendants.

“It is, therefore, ordered, adjudged and decreed as follows:

“(1) That the plaintiff, Magnolia Petroleum

Company, John Sealey, E. R. Brown, R. Waverly Smith, E. E. Plumley and W. C. Proctor, as trustees, take nothing by their suit, and that the temporary injunction heretofore granted, and afterwards continued against defendants, William T. Price and Ora Price, be dissolved, vacated, set aside and held for naught. That the plaintiff having gone upon the lands hereinafter described in paragraph 2 of this decree, under the authority of the temporary injunction heretofore wrongfully obtained and improvidently granted and continued, the said plaintiff is hereby ordered and directed to quit and vacate and abandon that part and parts of the premises occupied by it, and if said plaintiff does not quit and vacate said premises, or any part thereof, within thirty (30) days from the date of this decree, the Court Clerk is hereby directed upon the expiration of said thirty (30) days and upon the filing of an affidavit by the defendant showing that said plaintiff has not quit and vacated said premises, as required herein, to issue a writ directed to the Sheriff of Stephens County, Oklahoma, directing the said Sheriff to remove said plaintiff and all its trustees, officers, agents and employees from any and all parts of said land.

“(2) That the plaintiff, Magnolia Petroleum Company, John Sealey, E. R. Brown, R. Waverly Smith, E. E. Plumley and W. C. Proctor, as trustees, its or their successor or successors, agents, servants and employees, be, and they are hereby enjoined from trespassing or going upon or exercising any claim of possession, right or authority over, or in any way interfering with or obstructing defendants in the exercise of their respective rights, title and possession in and to the Northeast Quarter (NE $\frac{1}{4}$) of Section Thirty-three (33), Township

One (1) South, Range Eight (8) West of the Indian Meridian, in Stephens County, Oklahoma.

“(3) That the Commissioners of the Land Office of the State of Oklahoma, and their successors in office, and their agents, servants and employees, together with such other officers of the state having, or claiming to have, authority in the premises, and each of them be, and they are hereby enjoined from exercising any alleged right or authority over, or in any way interfering with or obstructing defendants, in the exercise of their rights, title and possession in and to the tract of land named and described in the foregoing paragraph.

“(4) That the oil and gas lease executed by the Commissioners of the Land Office of the State of Oklahoma to the plaintiff, the Magnolia Petroleum Company, on the 4th day of January, 1919, a copy of which is attached to plaintiff's Amended Petition and marked 'Exhibit A,' is hereby declared to be void as to the defendants, William T. Price and Ora Price, and the same is hereby adjudged to be set aside and held for naught, and the plaintiff, and its trustees, officers and agents, be, and they are hereby ordered and directed to execute a proper release of said oil and gas lease within thirty days from the date of this decree that will effectually release such oil and gas lease from being a cloud on the title to said lands. And if the said plaintiff shall fail to execute such release within said thirty days, it is further ordered, adjudged and decreed that this decree shall be a full and complete release of said oil and gas lease so held by the plaintiff herein, and that a certified copy of this decree may be filed with the County Clerk of Stephens County, Oklahoma, and with the Secretary of

the Commissioners of the Land Office of the State of Oklahoma by the defendants herein.

“(5) That the defendants, William T. Price and his wife, Ora Price, have, and have had at all time since their purchase, a vested right in and to said lands and have done all things required of them under the law, and are the owners and holders of the equitable title to said lands. That the sum of Three Thousand Dollars (\$3,000.00) is, and was the fair, and reasonable value of said lands, exclusive of the improvements owned by the said defendants, at the time said lands should have been sold by the Commissioners of the Land Office, and the State of Oklahoma by and through the Commissioners of the Land Office, is hereby ordered and directed to make and execute to the defendant, William T. Price, a patent in fee in the usual form, upon the payment by the said William T. Price of the sum of Three Thousand Dollars (\$3,000.00), together with interest thereon at the rate of five per cent (5%) from January 19, 1911, less the amounts paid as rentals since January 19, 1911, together with interest on amounts paid as rentals at the rate of five per cent (5%) from the date of each respective payment.

“(6) That the plaintiff, the Magnolia Petroleum Company, be, and it is hereby, directed to account for all oils, gas and other minerals taken from said lands, and for all items of loss and damage that it may have occasioned to said lands by reason of going upon the same under and by virtue of its oil and gas lease and the temporary injunction heretofore issued in this cause; and the Court reserves jurisdiction of this cause for the further taking of testimony and hearing on the matters and things set out in this paragraph, on both ques-

tions of law and fact, and sets the hearing of the same for the 6th day of May, 1921.

“(7) That the action of the Commissioners of the Land Office in leasing said lands to plaintiff for oil and gas purposes, violated the rights guaranteed to the defendants by the Constitution of the State, the Constitution of the United States and the laws of the United States.

“(8) That a receiver be appointed to take charge of the mineral development in and of said lands and the Honorable Ed. J. Kelly is hereby appointed such receiver until the further order of this Court, upon the giving of a bond in the sum of Fifty Thousand Dollars (\$50,000.00), to be approved by this Court, or the judge thereof, and the taking and filing of the usual oath of office; and upon the execution and approval of said bond and taking of said oath of office, he shall proceed to take charge of said lands, and of all and any of the oil and gas wells, pipes, tanks, pumps, buildings, machinery and appliances of all and every kind used, or connected with the oil and gas and mineral development of said lands. Also to take charge of all oil, gas and mineral production thereon, the storage, handling, sale and disposition thereof, and keep an accurate account of all oil and gas produced thereon, and the expense occasioned in the production thereof, and collect the proceeds from all oil and gas produced and pay the necessary and proper expenses thereon, and to employ and discharge or retain such help and employees as may be necessary to properly operate such mineral development. That upon taking possession of said property, said receiver shall make and cause to be made a full and complete survey and inventory of the said property and make a full and complete report thereof

to the Court, and shall mail a true copy of said report to the Counsel for the respective parties in this cause. The said receiver is further directed not to take charge of the agricultural operations of the defendant, William T. Price. That the duties herein required of the receiver may be changed at any time by the Court upon proper notice to the parties in the action, and such further and other duties as may be required and necessary may be from time to time given him by the Court; but that said receiver shall have full authority to do and perform the things required of him pending the further orders of this Court.

“(9) That the defendants, William T. Price and Ora Price, have and recover of the plaintiff and of the intervenor, the costs of this action; to which judgment of the Court and each and every paragraph thereof, the plaintiff and the intervenor, each for itself, excepts and exceptions are allowed.”

ASSIGNMENTS OF ERROR.

The assignments of error appear at record pp. 204 to 213, and are as follows:

"Come now the defendants in error, William T. Price and Ora Price, and respectfully submit that in the record, proceedings, decision and final decision of the Supreme Court of the State of Oklahoma in the above entitled matter, there is manifest error, and in connection with the petition for writ of error herein makes the following assignment of errors which the defendants in error, William T. Price and Ora Price, aver occurred in the final order and judgment herein, dated the 21st day of March, A. D. 1922, re-hearing denied the 3rd day of May, 1922, as follows, to wit:

"I.

"That the court erred in holding that the provisions of the Statutes of Oklahoma, to wit, Act of May 26, 1908, appearing Session Laws 1907-08, page 490, and as in the Revised Laws of the State of Oklahoma, 1910, Ch. 69, Art. 3, page 1938 (effective May 16, 1913), and as amended in the Statutes of the State passed and approved the 3rd day of March, 1917, appearing Sess. Laws 1917, Ch. 253, at page 462 (Senate Bill No. 181), are not in conflict with the provisions of Act of Congress of June 16, 1906 (Enabling Act of Oklahoma), 30 Stat. L. 507, and with the Constitution of the United States, Section 10, Article 1, and Amendment XIV thereof, for that the State of Oklahoma by and through the provisions of said Statute, assumes and seeks to deprive the defendants in error, citizens of the United States and of the State of Oklahoma, of property and of

title, and of rights, privileges and immunities secured to citizens of the United States, and of said state, by the Constitution of the United States, and the Act of Congress of June 16, 1906, and Statute of Oklahoma, Sess. L. 1909, Ch. 28, Art. II; and to deprive the defendants in error, and other citizens of the United States of liberty and property without due process of law; and to deprive and deny the defendants in error and certain citizens and persons within the jurisdiction of the State of Oklahoma of the equal protection of the law; and to impair the contract of lessees, Price and Price.

“II.

“The court erred in holding that by the provisions of said Statutes of the State of Oklahoma, Sess. L. of 1907-08, and Sess. L. 1917, these defendants in error are not deprived of property, title, rights, privileges, and immunities, secured to them and other citizens of the United States, and of the State of Oklahoma, by the Federal Constitution, and the laws of the United States, to wit, the Act of June 16, 1906 (Enabling Act of the State of Oklahoma).

“III.

“The court erred in holding that by the provisions of said acts of the Legislature of the State of Oklahoma, cited in Assignment II, *supra*, the defendants in error are not deprived of liberty and property without due process of law.

“IV.

“The court erred in holding that the said Statute cited in Assignment II, *supra*, and the authority exercised thereunder, and thereby authorized to be exercised thereunder, are within the power of the

Legislature of the State of Oklahoma, and not in contravention of the Constitution of the United States, and the Fifth and Fourteenth Amendments thereto, and the Act of Congress of June 16, 1906 (Enabling Act).

“V.

“The court erred in holding that the provisions of said Statutes of the State of Oklahoma cited in Assignment II, *supra*, and the authority exercised thereunder and thereby authorized to be exercised thereunder do not unlawfully discriminate between the defendants in error and others similarly situated within the State of Oklahoma.

“VI.

“The court erred in holding that the said Statutes of the State of Oklahoma cited in Assignment II, *supra*, do not grant or permit special and exclusive privileges to certain citizens of the State of Oklahoma which they deny to defendants in error, and other citizens of the State similarly situated, and do not permit same to be done, contrary to the Constitution and laws of the United States.

“VII.

“The court erred in holding, and in entering the judgment in said cause, perpetually enjoining the defendants in error from interfering with the operation of the Magnolia Petroleum Company on the land involved under the mineral lease or grant complained of by defendants in error, and in decreeing the royalties of oil and gas produced under said lease to the State of Oklahoma; and in limiting the recovery of the defendants in error, ‘To such damages as they may have sustained to their agricultural

lease by reason of the operation of said oil and gas lease,' for and because by so doing it deprived defendants in error of property without due process of law; and abridged rights of the defendants in error and impaired the contract between the United States and the State of Oklahoma, and of defendants in error in violation of Act of June 16, 1906, and the Constitution of the United States, Art. 1, Section 10, and Amendment XIV.

“VIII.

“The court erred in holding and deciding that the defendants in error, William T. Price and Ora Price, had not the preference right to buy said land, in its entirety, under the grant of such right in and to said land so conditioned by the Act of Congress of June 16, 1906 (Enabling Act), and accepted by Constitution of Oklahoma, Article XI, Section 1, and Statute of Oklahoma, Sess. L. 1909, Ch. 28, Art. II, all accepted and asserted by defendants in error, Price.

“IX.

“The court erred in holding and deciding that the defendants below, William T. Price and Ora Price, defendants in error, had not the preference right to buy said land, and all thereof, under the contract between the State of Oklahoma and these lessees expressed in the Constitution of Oklahoma, Article XI, and the State of Oklahoma, Session Laws 1909, page 448, being Chap. 28, Art. II, accepted and asserted by defendants as lessees of said land, and especially set up and claimed under the Constitution and Laws of the United States.

“X.

“The court erred in holding and deciding that

as to defendants in error, William T. Price and Ora Price, the Statute of Oklahoma of 1907-08, page 490, Chap. 49, Art. IV, Revised Laws 1910, page 1938, Chap. 69, Art. III, and the Statute of Oklahoma, Session Laws 1917, Chap. 253, page 462, did not impair, contrary to Article 1, Section 10, of the Constitution of the United States and the Fourteenth Amendment to said Constitution, the contract between the United States and the lessee, Price, and between the State of Oklahoma and the lessee, Price, expressed in the Act of June 16, 1906, and Oklahoma Constitution, Art. XI, Section 1, and in the Statutes of Oklahoma, Sess. Laws 1909, Chap. 28, Article II, page 448, accepted by Price as lessee.

“XI.

“The court erred in holding that the Statutes of Oklahoma cited in Assignment II, *supra*, as construed and applied in this case, to these defendants in error, did not take their liberty and property, and abridge their privileges as citizens of the United States, without due process of law, and in violation of the Constitution of the United States, Amendments V and XIV, and in holding that such legislation as construed and applied to these defendants in error does not take their liberty and property without compensation, and in violation of the Constitution of the United States and Amendments V and XIV thereto.

“XII.

“That the court erred in holding and deciding ‘that the only rights they (defendants in error) had * * * were no more than the preference right to re-lease said land for agricultural purposes.’ Because, and for the reason, that such holding con-

stitutes a deprivation of defendants' property, and an impairment of defendants' contract with the United States, and the State, and a denial of equal protection of the law to defendants in error, and the taking of property and liberty of defendants in error without due process of law, in contravention of the Constitution of the United States, and Amendments thereto.

“XIII.

“The court erred in holding that the Commissioners of the Land Office of Oklahoma ‘duly segregated such land in question from sale because of the oil and gas *supposed* to exist therein’ for the reason that such construction and application of the law impairs the contract of defendants in error, and deprives them of their property arbitrarily and without due process of law, and without compensation; for that by the law the defendants held preference right to buy said land and all of it, under and by virtue of the Act of Congress of June 16, 1906, and Constitution of Oklahoma, Art. XI, and the Statute of the State of Oklahoma of March 2, 1900, Sess. L., Ch. 28, Art. II, page 448, and held the preference right to lease and re-lease said land, and to the possession thereof and all of it, pending purchase, and for the reason and because the State of Oklahoma, by its legislation of March 2, 1909, had sold, or ordered sold said land on the terms in legislation expressed, and had caused the same to be appraised long prior to the purported Act of segregation; and the defendants, Price, had done and offered to do all things imposed upon them to do under the law, as found by the trial court to acquire the legal title thereto, and had acquired the equitable title as adjudged by the trial court, and such holding of the

court and application to these defendants constituted an impairment of defendants' contract; and deprivation of defendants' liberty and property; and a denial to defendants of equal protection of the law; all in contravention of the Constitution of the United States and Amendments thereto.

“XIV.

“The court erred in holding and deciding that the Commissioners ‘duly segregated such land in question from sale because of the oil and gas *supposed* to exist therein’ for the reason and because the Statute of Oklahoma, Sess. L. 1907-08, Chap. 49, Art. IV, page 490, and Statute of March 30, 1917, Sess. L. 1917, Chap. 253, page 462, or other law, did not confer plenary power, or authorize segregation of said land on ‘supposition,’ and did not authorize the arbitrary and whimsical discrimination practiced against defendants in error; and because the said statutes of Oklahoma did not provide for a hearing to determine whether or not the lands of defendants in error was mineral land or ‘supposed’ to contain mineral within the contemplation of said Statute; and because no notice of hearing on ‘segregation’ of said land was had; and because the law did not authorize the Commissioners of the Land Office of the State of Oklahoma to withhold the land of defendants in error from those ordered sold, or sold by the State by Statute of March 2, 1909, Sess. Laws 1909, p. 448, Chap. 28, Art. II (R. L. 1910, Ch. 69, Art. III), and the said holding and decision is applied to these defendants impaired the contract of defendants in error and deprived them of their liberty and property without due process of law, and without compensation, and denied to defendants in error the equal protection of the law, contrary to the

Constitution of the United States and the Amendments thereto, and makes said Statutes of 1907-08 and 1917 invalid.

“XV.

“The court erred in holding ‘the Commissioners of the Land Office could not have acted in good faith to the trust imposed in them by the Constitution and by the Statute, if they had advertised this land *believing* that it contains oil and gas products which would pay a hundredfold more to the State than the sale of land would pay,’ and by such decision, ruling and construction of the law as applied to these defendants in error, the rights of the defendants in error under the Constitution of the United States, and Act of Congress of June 16, 1906, is impaired, and their liberty and property taken without due process of law, contrary to the Constitution of the United States and the Amendments thereto, because and for the reason:

“(a) That the Commissioners of the Land Office of the State of Oklahoma had no *trust* imposed in them by the Act of Congress of June 16, 1906 (Enabling Act), insofar as this land and these defendants in error were concerned.

“(b) Their power was not made to depend upon their ‘believing’ something and to so construe and apply the law to these defendants in error, is to impair their contract right in and to said land, and to take their property without due process of law, and to deny them the equal protection of the law; all contrary to the Constitution of the United States and the Amendments thereto, and the Act of Congress of June 16, 1906 (Enabling Act of Oklahoma), and such construction makes said Statutes of 1907-08 and 1917 invalid.

“XVI.

“The court erred in holding: ‘But the State has not sold it and the lessee has not purchased it, and until the land is sold and purchased by the lessee and fee simple title conveyed to the lessee, such lessee has no right to the oil and gas and other minerals therein,’ for the reason that by such decision, construction and application of the State Statutes, the contract of defendants in error, relating to said land is impaired, and their liberty and property is taken without due process of law, and they are denied the equal protection of the law for the reason and because:

“(a) By Act of Congress of June 16, 1916 (Enabling Act), and by Sess. L. of Oklahoma 1909, p. 448, Ch. 69, Art. 1, Rev. L. 1910, the lessees were granted a preference right to purchase the land, and all of it, and its content and possession and such grant was accepted by the lessees, defendants in error, and is property and is protected by the Constitution of the United States, Article 1, Section 10, and the Fourteenth Amendment; and

“(b) Because the State of Oklahoma, by Act of March 2, 1909, page 448, Chap. 26, Art. II, sold, or ordered sold, said land to the lessee thereof; and granted preference rights in and to said land, and all of it, and all its content and possession under the terms in said Statute expressed; and the said grant by the said Legislature was by the said lessee accepted and he performed all on him imposed, and demanded conveyance; and, said decision by its construction and application of the law relating to said land impairs the contract between the lessees (defendants in error) and the United States of America, and the State of Oklahoma, in contravention of the

Constitution of the United States and the Amendments thereto, and deprives the lessees of their liberty and property and privileges and immunities under the law, in contravention of the Constitution of the United States and Amendments thereto.

“XVII.

“The court erred in holding that the ‘contract’ of the lessee of said lands, defendants in error, relating to said land and between said lessee and the United States of America, and the State of Oklahoma was, or could be, other than the state of the law governing said lands and applying to said lessee, common with all others similarly situated in said State, and as expressed in the Constitution of the United States and the Act of Congress of June 16, 1906 (Enabling Act), and the Constitution of the State of Oklahoma, accepting the conditions thereof and the legislation of the State of Oklahoma of March 2, 1909, aforesaid; and by such decision, judgment and order, and its application to said lands, and to defendants in error, the court impaired the contract existing between defendants in error and the State and the United States in relation to said land, and deprived defendants of their liberty and property without due process of law, and without compensation, and denied to defendants the equal protection of the law in contravention of and repugnant to the Constitution of the United States, Section 10, Article I, and Amendment XIV to the said Constitution.

“XVIII.

“The court erred in holding that the Statute of Oklahoma, Sess. Laws 1907-08, page 490 (Rev. Laws of Oklahoma of 1910, Chap. 69, Article III, p.

1938, and as amended March 30, 1917, Sess. Laws 1917, Chap. 253, page 462), was not in violation of and repugnant to the Constitution of the United States, Article I, Section 10, and the Fourteenth Amendment thereto, and did not impair the obligation of contract between the defendants below and the State of Oklahoma, and the United States of America, constituted by the Constitution of the United States and the Act of Congress of June 16, 1906 (Enabling Act), and the Constitution of the State of Oklahoma, Article XI; and the Acts of Oklahoma, Session Laws 1909, page 448 (Rev. Laws 1910, Chap. 69, Art. I, Sec. 1, *et seq.*, page 1923), accepted and acted upon by the defendants below, defendants in error here; and in holding that the said Statute of 1907-08 did not take defendants' property without due process of law, and did not deprive defendants of liberty and property without due process of law, and contrary to the Constitution of the United States and the Fourteenth Amendment thereto.

“XIX.

“The court erred in holding, deciding, decreeing and ordering that the defendants in error do not have and hold an equitable title, defensible in law, in and to the said land and did not own and hold an estate in fee therein by virtue of the status in law of said land, and said lessees thereof, and under the Act of Congress of June 16, 1906, and the Rules and Regulations referred to and incorporated therein, and the legislation of the State of Oklahoma thereunder and pursuant thereto, and not in not holding that the said estate was equivalent to and amounted to an estate in fee in said land without reversion, and subject only to the change in rate of annual pay-

ment by the lessee thereof; and the court by such decision, judgment and decree, and by the application thereof to these defendants in error, impaired the obligation of the contract of defendants in error, relating to said lands as expressed in the law aforesaid; and deprived defendants in error of liberty and property without due process of law and denied defendants in error the equal protection of the law, contrary to the Constitution of the United States and the Fourteenth Amendment thereto.

“XX.

“That said Statutes of Oklahoma, Sess. L. 1907-08, p. 490, and 1917, p. 462, Ch. 253, and the interpretation placed upon the legislation of the State of Oklahoma aforesaid, and the action of the Commissioners of the Land Office of the State of Oklahoma aforesaid, violates the trust reposed in the State by the Act of June 16, 1906, and diverts the said lands involved herein from the uses and purposes designated by Congress in the said Enabling Act and denies to the defendants in error (lessees of said land), their property and rights under the said Act of Congress of June 16, 1906, and is therefore void; because repugnant to the Constitution of the United States and Amendments thereto.

“XXI.

“The court erred in rendering and entering the judgment, order and decree herein rendered and entered.

“XXII.

“The court erred in denying defendants in error rehearing applied for, and in overruling defendants' in error motion and application for re-hearing.

“XXIII.

“The court erred in holding that the State of Oklahoma, or its Commissioners of the Land Office of Oklahoma, could, or did, regain the estate granted to the lessee by preventing him from performing the conditions subsequent fixed by the law of grant.

“Wherefore, these defendants, William T. Price and Ora Price, defendants in error in the Supreme Court of the State of Oklahoma, and petitioners in error in writ of error to the Supreme Court of the United States, pray that a writ of error from the Supreme Court of the United States may issue to the Supreme Court of the State of Oklahoma, and further pray that the Supreme Court of the United States will reverse the final order and judgment of the Supreme Court of the State of Oklahoma, and that the defendants, William T. Price and Ora Price, may be restored to all things which they have lost by occasion of said final order and judgment of the Supreme Court of the State of Oklahoma, and that they may have such further and other relief as may be proper and just; for all of which they invoke the protection of the Act of Congress of June 16, 1906, and the acceptance thereof in the Constitution of Oklahoma, and invoke the protection of the Constitution and Laws of the United States and Amendments thereto.

Respectfully submitted,

Blake & Boys,
Stuart, Sharp & Cruce,
W. C. Stevens,

Attorneys for Defendants in Error.

These assignments present the questions:

1. Was the preference right to re-lease under Rules of Secretary of Interior a property or vested right?

2. Was the preference right to re-lease reaffirmed by the legislature after statehood, Session Laws 1907-08, p —, a vested or property right.

3. Is the preference right to buy given the lessee, Price, by Section 10 of Enabling Act, 34 Stat. at L. 267, a property or vested right and a grant to him?

4. Does Section 10 of Enabling Act and Section 28 of Schedule of State Constitution, Section 1 of Article II of State Constitution, and Section 4 of Article II of State Constitution, create a contract by which the preference right to buy must be preserved for Price, and when authorized to be sold by legislature must be given him?

5. Does the sales Statute, Session Laws 1909, page 448, repeal the segregation statute of 1907-08 and give to Price the right to exercise his preference right, and is it mandatory on the Board to sell?

6. Can any subsequent legislation or action of the Board deprive Price of his rights so granted?

7. Have Price's rights guaranteed him by the Federal Constitution and the various Acts of Congress been violated?

8. Is the opinion of the Supreme Court of Oklahoma, record pages 170-186, correct in denying Price protection under the Enabling Act and the Federal Constitution?

These questions will be discussed in the order

and under the topics as shown in the index to this brief in order to avoid repetition.

ARGUMENT.

Legislation Respecting Lands Involved Prior to Statehood.

Section 36 of the Act of March 3, 1891, 26 Stat. L. 1043, provides:

“Section 36. That the school lands reserved in the Territory of Oklahoma by this and former acts of Congress, may be leased for a period not exceeding three years for the benefit of the school fund of said territory by the Governor thereof under regulations to be prescribed by the Secretary of the Interior.”

Pursuant to this Act of Congress, the Honorable George W. Steele, then Governor of the Territory of Oklahoma, on March 19, 1891, took up with the Secretary of the Interior the matter of Rules and Regulations to be adopted. Pursuant to the correspondence then had the Acting Commissioner on March 19, 1921, promulgated Rules, which were approved by the Honorable George Chandler, Secretary of the Interior, on March 20, 1891, certified copy of which appears Record pages 129 to 136, inclusive.

A reading of these letters and Rules gives

one a good idea of the conditions at that time and the motive, which prompted the Governor and Secretary of the Interior in adopting Rules that would protect and encourage any *bona fide* settler. The particular Rule I desire to call your attention to appears on page 134, and is as follows:

“In case a new lease is to be made at the end of the three years the preference shall be given the former lessee, if the Governor finds that he cultivated the land in a business like manner, and fulfilled the term of the lease in good faith.”

It is a matter of history in the State that from the time of the adoption of these Rules, during all of the time until the passage by the Legislature after statehood of the Sale Act, that the question of the disposition of the School Lands was prominent in the minds of the people of the State as well as the officers having charge thereof. At the time of statehood it was a political issue and prominently discussed in various campaigns as to whether the lessee should be given preference right to buy and as to whether the State should sell the leases when granted to them. The result of these discussions is reflected in the Enabling Act and the Constitution of the State as well as the immediate passage after statehood of the Sale Statute.

Following the adoption of these Rules and Regulations, the Act of May 4, 1894, Vol. 28, Stat. L., p. 71, ratified the President's Proclamation reserving Section 33 for Public Building. By this same act, the Rules and Regulations heretofore quoted were ratified and adopted by Congress. This act reads as follows:

“Be it Enacted By the Senate and House of Representatives of the United States of America in Congress Assembled: That the reservation for university, agricultural college, and normal school purposes, of section thirteen in each township, of the lands known as the Cherokee Outlet, the Tonkawa Indian Reservation, and the Pawnee Indian Reservation in the Territory of Oklahoma, not otherwise reserved or disposed of, and the reservation for public buildings of section thirty-three in each township of said lands not otherwise disposed of, made by the President of the United States in his proclamation of August nineteenth, eighteen hundred and ninety-three, be, and the same are hereby ratified, and all of said lands and all of the school lands in said territory may be leased under such laws and regulations as may be hereafter prescribed by the legislature of said Territory; but until such legislative action the governor, Secretary of the Territory and superintendent of public instruction, shall constitute a board for the leasing of said lands under the rules and regulations heretofore prescribed by the Secretary of the Interior, for the respective purposes for which the said reser-

uations were made, except that it shall not be necessary to submit said leases to the Secretary of the Interior for his approval; and all necessary expenses and costs incurred in the leasing, management, and protection of said lands and leases may be paid out of the proceeds derived from such leases."

The lands involved are located in what was known as the Kiowa and Comanche country, and said lands were not open to settlement until 1901. However, by the Act of Congress of June 6th, 1900, 31 Stat. L., page 680, the Kiowa and Comanche country was opened to settlement and section 33, together with other lands located in the Kiowa and Comanche country, were reserved for public buildings to the Territory of Oklahoma, and future State of Oklahoma, in the following language:

"That sections sixteen and thirty-six, thirteen and thirty-three of the lands hereby acquired in each township, shall not be subject to entry, but shall be reserved, sections sixteen and thirty-six for the use of the common school and sections thirteen and thirty-three for university, thirty-six for the use of the common schools and public buildings of the territory and future State of Oklahoma; and in case either of said sections or parts thereof, is lost to said territory by reason of allotment under this act or otherwise, the governor thereof is hereby authorized to locate other lands not occupied in quantity equal to the loss."

The next legislation of Congress was the Act approved June 16, 1906; 34 Stat. L. 267. It is commonly called the Enabling Act. Sections 8, 9 and 10 of the Enabling Act are the sections covering the lands granted by Congress for school and public building purposes:

Section 8 is as follows:

“UNIVERSITY, ETC., GRANTS—ALLOTMENTS—
USE OF LANDS AND PROCEEDS—LANDS FOR PUBLIC INSTITUTIONS AND BUILDINGS—MINERAL AND OIL LANDS. That section *thirteen* in the *Cherokee Outlet*, the *Tonkawa Indian Reservation* and the *Pawnee Indian Reservation* reserved by the *President* of the United States by *Proclamation* issued *August nineteenth, eighteen hundred and ninety-three* opening to settlement the lands, and by any *Act or Acts of Congress* since said date and section *thirteen* in all other lands which have been or may be opened to settlement in the Territory of Oklahoma, and all lands heretofore selected in lieu thereof, is hereby reserved and granted to said State *for the use and benefit* of the University of Oklahoma and the University Preparatory School, one-third; of the *normal schools* now established or hereafter to be established; *one-third*; and of the *Agricultural and Mechanical College* and the *Colored Agricultural Normal University*, one-third. The said lands of the proceeds thereof as above apportioned shall be divided between the institutions as the Legislature of said State may prescribe: Provided, That the said lands so reserved or the proceeds of the sale thereof

shall be safely kept or invested and held by the said State and the income thereof, interest, rentals or otherwise, only shall be used exclusively for the benefit of said educational institutions. Such educational institutions shall remain under the exclusive control of said State and no part of the proceeds arising from the *sale or disposal* of any lands herein granted for educational purposes, or the income or rentals thereof, shall be used for the support of any religious or sectarian school, college or university.

“That section thirty-three, and all lands heretofore selected in lieu thereof, heretofore reserved under said proclamation, and Acts for charitable and penal institutions and public buildings, shall be apportioned and disposed of as the Legislature of said State may prescribe.

“Where any part of the lands granted by this Act to the State of Oklahoma *are valuable for minerals*, gas and oil, such lands shall not be sold by the said State prior to January first, nineteen hundred and fifteen; but the same may be leased for periods not exceeding *five years* by the State officers duly authorized for that purpose, such leasing to be made by public competition after not less than thirty days advertisement in the manner to be prescribed by law, and all such leasing shall be done under sealed bids and awarded to the highest responsible bidder. The leasing shall require and the advertisement shall specify in each case a fixed royalty to be paid by the successful bidder, in addition to any bonus offered for the lease, and all proceeds from leases shall be covered into the fund to which that shall properly belong,

and no transfer or assignment of any lease shall be valid or confer any right in the assignee without the consent of the proper State authorities in writing: Provided, however, that agricultural lessees in possession of such lands shall be reimbursed by the mining lessees for all damage done to said agricultural lessees' interest thereon by reason of such mining operations. The Legislature of the State may prescribe additional legislation governing such leases not in conflict herewith."

Section 9 is as follows:

"DISPOSAL OF COMMON SCHOOL LANDS—SCHOOL FUND FROM PROCEEDS—LEASE, ETC. That said sections *sixteen and thirty-six* and lands taken in lieu thereof, herein granted for the support of the common schools, if sold, may be appraised and sold at public sale in one hundred and sixty acre tracts or less, *under such rules and regulations as the Legislature of the said State may prescribe, preference right to purchase at the highest bid* being given to the lessee at the time of such sale, the proceeds to constitute a permanent school fund, the interest of which only shall be expended in the support of such schools. But said lands may, under such regulations as the Legislature may prescribe, be leased for periods not to exceed ten years; and such lands shall not be subject to homestead entry or any other entry under the land laws of the United States, whether surveyed or unsurveyed, but shall be reserved for school purposes only."

Section 10 is as follows:

“UNIVERSITY AND PUBLIC INSTITUTION LANDS
SALES OR LEASES—APPRAISAL OF IMPROVEMENTS
—PAYMENT BY PURCHASER. That said sections
thirteen and thirty-three aforesaid, if sold, may
be appraised and sold at public sale in one hun-
dred and sixty acre tracts or less, *under such*
rules and regulations as the Legislature of said
State may prescribe, preference right to pur-
chase at the highest bid being given to the les-
see at the time of such sale, but such lands may
be leased for periods of not more than five
years under such rules and regulations as the
Legislature shall prescribe, and until such time
as the Legislature shall prescribe such rules
these and all other lands granted to the State
shall be leased under existing rules and regula-
tions, and shall not be subject to homestead en-
try or any other entry under the land laws of the
United States, whether surveyed or unsur-
veyed, but shall be reserved for designated pur-
poses only, and until such time as the Legisla-
ture shall prescribe as aforesaid *such lands*
shall be leased under the existing rules: Pro-
vided, That before any of said land shall be
sold as provided in sections nine and ten of this
Act, the said lands and improvements thereon
shall be appraised by three disinterested ap-
praisers, who shall be non-residents of the
county wherein the land is situated, *to be desig-*
nated as the Legislature of said State shall pre-
scribe, and the said appraisers shall make a
true appraisement of said lands at the actual
cash value thereof, exclusive of improvements,
and shall separately appraise all permanent im-
provements thereof at their fair and reasonable

value, and in case the leaseholder does not become the purchaser, the purchaser at said sale shall, *under such rules and regulations as the Legislature may prescribe*, pay to or for the leaseholder the appraised value of said improvements and to the State the amount bid for the said lands, exclusive of the appraised value of improvements; and at said sale no bid for any tract at less than the appraisalment thereof shall be accepted."

Section 12 of the Enabling Act is a grant of land in lieu of a grant of land for purposes of internal improvements made to new States under Section 8 of the Act of September fourth, 1841, and grants to the State for certain specified schools several hundred thousand acres of land which are commonly spoken of as new college lands. It should be noted here that the preference right to purchase at the highest bid given the lessee does not apply to the new college lands, for the very obvious reason that these new college lands had never been leased as this was the initial legislation, but does apply to sections sixteen and thirty-six and thirteen and thirty-three, without regard to their character or mineral content, and in recognition of lessees rights.

Section 22 of the Enabling Act provides:

"That the constitutional convention provi-

ded for herein shall, by ordinance irrevocable, accept the terms and conditions of this Act.”

By Section 28 of the schedule to the State Constitution the State did accept the terms of the Enabling Act in the following language:

“The terms and provisions of an act, etc. (Enabling Act) are hereby accepted. * * *

Section 1 of Article 11 of the State Constitution also accepted the grants of the land in the following language:

“The State hereby accepts all grants of land and donations of money made by the United States under the provisions of the Enabling Act and any other acts of Congress for the *uses and purposes and upon the conditions, and under the limitations for which the same are granted and donated*, and the faith of the State is hereby pledged to preserve such lands and moneys, and all moneys derived from the sale of any of such said lands, as a sacred trust, and to keep the same for the uses and purposes for which they were granted and designated.”

Section 4 of Article 11 of the Constitution authorizes the sale of all public lands granted by Congress in the following language:

“All public lands set apart to the State by Congress for charitable, penal, educational and public building purposes, and all lands taken in lieu thereof, may be sold by the State *under*

such rules and regulations as the legislature may prescribe in conformity with the regulations of the Enabling Act."

By this legislation upon the part of Congress and the acceptance of the terms of the Enabling Act by the people of the State of Oklahoma through the adoption of their Constitution, the rights of the government, the rights of the State, and the rights of the "lessee" on the public land, and the authority and the duty of the State is fixed according to the terms, provisions, conditions, and limitations of this legislation of Congress.

We desire to impress on the Court that prior to the passage of the Oklahoma Enabling Act, Congress had never passed an Enabling Act effecting the public lands in any other state in the Union wherein the preference right to re-lease, and to purchase at sale was given the lessee. Consequently, in all other grants to other States the lessee had by law at the time of purchase no especial rights or preference; therefore any authority based upon the right of the State, or the title of the State, to such lands under other Enabling Acts does not apply in the case at bar. The compact between the government and the State fixes the lessee's right and limits

what the State can do, while in other States the lessee had no such rights in the lands as they have under the Acts of Congress relating to Oklahoma.

Legislation By the State Since Statehood.

We have heretofore dealt with the legislation of Congress prior to statehood and with the provisions of the Constitution. We will now turn to the legislation of the State concerning the land involved since statehood.

We first desire to call the Court's attention to the Act of February 8, 1908, appearing in the Session Laws of 1907-1908, at page 484, Section 1 of the act provides for the extension of the leases then on the land until January 1, 1909, which, of course, is a recognition by the State of the rights of the lessees then on the lands. Section 2 reads as follows:

“It shall be the duty of the Commissioners of the Land Office to cause an appraisement to be made as soon as practicable of all lands granted to the State for educational and public building purposes. Said appraisement to contain a complete description of said land, showing the number of acres in cultivation on each quarter section, the amount of cotton, corn and other farm products raised on said land for the year nineteen hundred seven and nineteen hundred eight, the actual cash value of said land with the improvements thereon, the value of

the improvements, giving a description and kind of said improvements, the cash value of the same, the number of years said improvements have been on said land, the name of the lessee occupying same, and if the land leased is not occupied by the lessee, and the same has not been subleased by the lessee, give the price for which said sublessee pays per acre. Said appraisement to contain a list of all land suitable for townsite purposes, and state whether or not any of said land is now being used for townsite purposes, and if so, the kind and character of buildings thereon, said appraisement to contain a complete geographical and statistical report by counties and such additional information as may be required by the Commissioners of the Land Office. Provided, the appraisers shall not be appointed from the county in which the land to be appraised is located or from any county adjoining the county in which the land is to be appraised is located; and provided further, that no one who has any interest or claim in any of the school lands shall be appointed as such appraiser."

Section 3 reads as follows:

"It shall be the duty of the Commissioners of the Land Office to make a detailed and summarized report of all the statistics obtained under the provisions of this Act, to the next Legislature, on or before the fifth legislative day thereof."

The same Legislature passed another Act under date of May 26th, 1908, appearing in Session

Laws of 1907-1908, page 486. The first section of it reads as follows:

“When any tract of land belonging to the State is, by the Commissioners of the Land Office, *known to be mineral in character*, the Commissioners of the Land Office shall enter of record, in their office, their findings, declaring that such mineral character does exist, and further declaring the minerals thereof segregated from the surface uses and interests therein, and all such mineral interests shall be reserved for sale until the year 1915, and for such additional period of time as may be determined by law.”

It is thereby observed that the lands to be segregated under this act were the ones known to be mineral in their character and the Legislature also complied with the provision of the Enabling Act which prohibited the sale of mineral lands until the year 1915. The remaining parts of the acts have to do with the prospecting of the public lands and of legislation concerning the development of public lands under mining laws. These, of course, are not involved in this case, for the reason that no development under the mining laws has ever been made upon the lands in controversy. However, Section 21, appearing at page 489, provides that “all preference rights, vested rights and equities shall be inherent rights.”

The same Legislature passed the Act approved May 26th, 1908, appearing at page 490 of the Session Laws of 1907-08. By this Act it is provided by Section 1 as follows:

“When any tract of the school and other public lands, granted to the State of Oklahoma under the Act of Congress known as the ‘Enabling Act’ is by the Commissioners of the Land Office of the State, known to contain oil or gas, or where such lands are, by said Commissioners, deemed valuable for oil and gas purposes, such Commissioners shall enter of record in their office, their finding, declaring that such oil or gas character exists, and further declaring that the oil and the gas deposits are segregated from the surface use and interest therein, and such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this Act.”

It is to be noted that both Acts fail to provide for any notice to the then lessee of the lands of such proposed segregation of lands “known to contain oil and gas” or “deemed valuable for oil and gas purposes,” and they attempt, in this section, to withhold the land from sale, lease or other alienation except as provided in this act. This provision, of course, could not be binding upon any subsequent legislature and was effectively repealed by the laws of 1909 as we will hereinafter show.

Section 3 of this Act provides for the leasing of the lands:

“FIRST: For a period not exceeding five years, with suitable provisions for preference right to re-lease for a second terms of five years at its expiration, at the maximum rate of rentals, royalties and bonuses that may be obtained therefor, at the time of such renewal.

“SECOND: Provision for advertisement.

“THIRD: Provides for public bids and the rejection of any and all bids.

“FOURTH: Provides for fixed royalty of not less than twelve and one-half per cent.”

Section 5 reads as follows:

“No lease shall be executed to, or in the interest of any pipe line or transportation company, or and company allied to, or confederated therewith, or any subsidiary company thereof, nor any other company, corporation, person or association under the control of either or all of them, nor to any stockholder, officer, director, agent, representative or employe, acting singly or as firms, or corporations of such company, or either of them. Leases executed under the terms of this Act shall stipulate that, for any refinery of crude oils and its products and by-products, owned, operated or controlled by the State, the State shall have the preference right to purchase and receive the output of such oil and gas lease at the market price thereof. Provided, nothing in this Act shall prevent the lessee from selling the output of said leases to any person, firm or cor-

poration whatsoever until notice in writing from the Commissioners of the Land Office shall be served on the lessee that the State is ready to take such oil and gas, or either of them, and all sales of oil and gas under this proviso shall be valid and binding."

Section 6 provides for the payment of damages to the surface only, occasioned by the oil and gas lessee.

Section 7 provides for condemnation in case of failure to agree. This is the first piece of legislation that has come to our notice that permits the taking of private property for private uses. In other words, the Legislature has here acknowledged an interest or ownership in the lessee to the lands covered by the lease and yet they say that another lessee may come along and condemn his lease. That is certainly violative of the Constitution prohibiting such taking—both of the State and United States. This is the first time that any reference has been made to a surface lessee by any legislation. Perhaps the Legislature only meant to use the words "surface" as descriptive of the lessee and not with the intention of saying the prior lessee had only a surface interest.

Pursuant to the Act appearing pages 484-485,

Session Laws of 1907-08, the Commissioners of the Land Office made the report to the Legislature which met in 1909 as required by Section 3. An examination of the Journal of that session shows the time was extended a few days in order that the Commissioners might get their report completed to the Legislature. It is perhaps quite significant in view of this legislation in 1907-08 to call attention to some of the special messages by Governor Haskell to this Legislature.

On December 2, 1907, he said:

"I recommend immediate legislation for the sale of school lands according to the grant under which said land was obtained by the State and the provisions of the Constitution."—Senate Journal, page 8, Governor's Messages.

On March 30th, 1908, he again, in a special message, said:

"The Constitution empowers the Legislature to provide for the sale of school lands under such regulations and conditions as shall deal justly with the rights of the lessees who, by their efforts have added to the value of such property and also mindful of the rights of the State and its people at general. These lessees have a right to know what the future has in store for them and I trust that before this session closes you will have passed upon that question in such a way as to deal justly with the interest of the public and the lessees."—Senate Journal, 1909, page 36, Governor's Messages.

Again, on May 4th, 1908, the Governor said in his special message:

"As I view the matter, it would be an act of bad faith to neglect action upon the question of the sale of the school lands and one that would lead to an appeal to the people for a law without consideration of the legislative department."—Senate Journal, page 49 of Governor's Messages.

Pursuant to these messages, the appraisement of the lands was authorized by the Legislature of 1907-08, and in compliance with the requirements of the Enabling Act, relative to such an appraisement.

The Legislature of 1909 passed an Act approved March 22, 1909, appearing Session Laws 1909, page 440, providing for the manner and procedure of leasing the public lands of the State.

Section 2 provides that sections sixteen and thirty-six, reserved for common schools, shall be leased for periods of ten years and that the present lessee, including those having right to re-lease, east of ranges thirteen and fourteen, shall only be permitted to lease 160 acres, while west of said ranges 640 acres.

Section 3 provides that all lands reserved for

universities, agricultural colleges, etc., shall be leased for a period of five years.

Section 4 reads as follows:

“All lands reserved, the proceeds of which are to be used in the construction of penal, charitable and public buildings, and all indemnity land of whatsoever character, and all lands granted to the State of Oklahoma under and by virtue of section 12 of the Enabling Act admitting Oklahoma to statehood, until the same shall be sold as by law provided, shall be leased by the Commissioners of the Land Office under such rules and regulations as they may prescribe; provided, that no preference right to purchase or release shall be granted on lands secured under and by virtue of section 12 of the Enabling Act admitting Oklahoma to statehood.”

It will be noted that by this section the Legislature kept in mind that the lessee had a preference right to buy and indicated that they expected to sell and also provided, as the Enabling Act did, that there was no preference right on the new college lands granted by virtue of Section 12 of the Enabling Act.

Section 6 provides for the leasing of vacant lands.

The same Legislature passed an Act approved

March 2, 1909, Session Laws 1909, page 448, providing for the sale of section thirty-three and all lien or indemnity land.

Section 1 of the Act reads as follows:

“The Commissioners of the Land Office shall dispose of, sell and convey, subject to such limitations, exceptions, conditions, rules, regulations and instructions, as provided in the Enabling Act, in this act, or any act amendatory thereof, except where same is embraced in any reservation specifically reserved for sale in this act or any act of Congress or any act of the State specially reserving any part thereof, for any special purpose, all of the following enumerated and described school and public lands of this State:

“All lands owned by this state, reserved, granted, and taken in lieu of sections numbered sixteen (16), thirty-six (36), thirteen (13) and thirty-three (33), and known as Indemnity Lands: Provided, that when such lands or any part thereof are sold and conveyed, the proceeds derived therefrom shall be prorated among the several funds as their interest may appear, and used as provided by law; also all lands embraced in sections numbered thirty-three (33) in that part of the state formerly known as Oklahoma Territory, and granted to the state for charitable and penal institutions and public buildings: Provided, that all the money derived from the sale of any or all of said lands, shall be apportioned and disposed of as may be provided by law; also all lands granted to this state by the United States under and by virtue of section 12 of the Enabling

Act for the following purposes, namely: For the benefit of the Oklahoma University two hundred and fifty thousand acres; for the benefit of the Agricultural and Mechanical College, two hundred and fifty thousand acres; for the benefit of the University Preparatory School, one hundred and fifty thousand acres; for the benefit of the Colored Agricultural and Normal University, one hundred thousand acres; and for the benefit of the normal schools now established or hereafter to be established, three hundred thousand acres: Provided, that all money derived from the sale of any of said lands shall be invested for said *state in trust*, and interest thereon shall be used exclusively and as shown above proportioned in the support and maintenance of said school: Provided, that if any tract, part or parcel of any of the land enumerated and described in this section, was or shall be returned to the Commissioners of the Land Office by a board of appraisers thereof, including those tracts of land embraced in sections numbered thirteen (13), sixteen (16), and thirty-six (36), and otherwise herein reserved for sale, that are now platted and occupied and leased directly from the State or Territory of Oklahoma for townsite purposes, as being more valuable for townsite than for agricultural purposes, then such tract, part or parcel of such land shall be by said Commissioners of the Land Office reserved from sale and disposed of under the terms of this bill: Provided, further, that where any part of any of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of said lands shall not be sold prior to January 1, 1915."

Subdivision (b) of Section 3, appearing at page 451, reads as follows:

“Any lessee holding a lease on any of the lands described in section 1, of this act, except New College lands, shall have the preference right to purchase 160 acres so leased, at the highest bid at the time of sale of the same as hereinafter provided in this bill. * * *,”

The remainder of the section being proviso concerning New College lands and other lands not similar to the lands in controversy.

Section 4 reads as follows:

“Said lands and improvements thereon shall be sold under the appraisement of the year 1908, made and returned to the Commissioners of the Land Office. Provided, that in the event it shall appear the said land or improvements have not been properly appraised, the Commissioners of the Land Office shall have the power to order and provide for new appraisement: Provided, further, the Commissioners of the Land Office shall notify the lessee before such land is offered for sale of the appraised value of his improvements, and should any such lessee be dissatisfied with the appraised value of his improvements, said lessee shall within thirty days from notice thereof notify the Commissioners of the Land Office in writing; whereupon the land covered by said lessee's contract shall be reserved from sale, pending a review of the appraisement made by the said Commissioners of the Land Office in the district court

of the county in which said land is located. An appeal from the Board of Appraisers may be taken as provided in 'An Act Amending Section 28 of Article 9, Chapter 17 of the Statutes of Oklahoma, 1893, and Regulating the Method of Procedure in the Condemnation of Private Property for Both Public and Private Uses,' approved May 20, 1908; and the procedure of such appeal and the review and demand for jury trial in said court shall conform to the procedure therein set forth; and pending the termination of said appeal the lessee shall be entitled to remain in possession of said property, paying therefor as rental five percentum of the appraised value of said land upon which said improvements are located: Provided, however, in addition to that which is herein stipulated, there shall nowhere be a meaning of any or all of the provisions or of the sections of this act, collectively or severally, so construed as to extend to any lessee the preference right of purchase to any of the lands withdrawn from homestead entry and granted to the State under any by virtue of Section 12 of the Enabling Act."

Section 15 reads as follows:

"All the lands now leased, described and enumerated in Section 1 of this Act, shall be opened for sale immediately upon the appraisalment of the same as provided in this Act and by law, and all of said lands offered for sale under the provisions of this Act that are leased shall be sold upon the expiration of each lease contract, or sooner upon petition of lessee to the Commissioners of the Land Office, asking for sale of any of said lands so leased."

Section 17 reads as follows:

“Any willful violation of this Act by any member of the Commissioners of the Land Office or by any member of the Board of Appraisers or by any other officer or agent selected to perform any of the duties required under this Act shall constitute a felony, and, upon conviction, he shall be punished by imprisonment in the penitentiary for not less than three years, nor more than ten years, and shall be summarily removed from office and forever disqualified from holding any office of honor, trust or profit under the Constitution and laws of this State.”

Section 18 reads as follows:

“All Acts and parts of Acts in conflict herewith are hereby repealed.”

This is the Act that is in force to this date authorizing the sale of the lands involved in this case. It is to be noted that Section 1 provides for the sale of all kinds and character of lands including town-site and mineral lands. The last proviso of Section 1 reads:

“Provided, further, that where any part of any of the above enumerated and described lands are known to be valuable for mineral, including gas or oil, such part of said lands shall not be sold prior to January 1, 1915.”

This Act is a definite authority to sell, not only lands agricultural in character, but lands known to

be mineral. The lands in controversy were not known to be mineral at the time of the passage of this Act, and they were not known to be mineral until about the time, and shortly after the commencement of this action in 1920.

Preference Right Vested at Time of Grant.

Counsel for defendant in error have heretofore and I assume will here, contend that the last part of Section 8 of the Enabling Act, quoted, *supra*, applies to the lands involved. A reading, however, of the section will disclose that it is, first, the grant of the lands, and, second, it uses the word *where* any part of the lands granted by this Act to the State of Oklahoma *are valuable for minerals*. The word *where* denotes place and the word *are* the present tense. If Congress had in mind to permit this part of the section to be applied to after discovery of minerals, it would have used the expression *are* or might hereafter *become*.

2. The last part of the section provides for lease for only five year periods.

3. It provides that the agricultural lessees in possession of such lands shall be reimbursed by the mining lessee for all damages thereon by reason of

such mining operations. Under this section Congress certainly did not intend to say that leases of this kind could be made upon lands discovered to be mineral some fifteen years afterwards, neither did they intend to say that a lease for five years or as long thereafter as oil and gas should be found should be executed. There would, of course, be some damage to the lessee in possession as a result of the five year operation under an oil and gas lease. The complete answer to my mind to their contention is that the preference right was not destroyed by this provision, nor excepted from the general clause giving the preference right in Section 10 of the same Act. The character and extent of the damage suffered to the lessee in possession under the five year lease would be very different from the damage suffered under a perpetual lease.

We believe that this section only applies to those lands then known to be mineral, that is, at the time of the grant, and that if the State should see fit to lease them for the five year period, they then had the right to sell them after January 1, 1915, and that the original *lessee in possession* had the preference right then to buy mineral and all. If any other construction is to be put upon this section, it

means that the title under the preference right must be held in abeyance and not vested in any particular person until the time when all persons who might desire to speculate upon the mineral character of the land might have abandoned their quest for oil and gas on the particular tracts.

Could it be said that the preference right to buy the land and all of it, including the mineral, was first in Price, then perhaps ten years afterwards by reason of some local oil flurry, a lease could be sold on the lands and during that time he should not have the preference rights, then when the flurry was over and no leases could be sold that it was returned again to Price and so on indefinitely?

The case of *Colorado Coal & Iron Company v. United States*, 123 U. S. 307, 31 L. ed. 182, is a case brought by the United States against the Colorado Coal & Iron Company to cancel certain patents, alleging fraud in obtaining the patents. The Colorado Coal & Iron Company being an innocent purchaser from the patentee under the pre-emption act. The pre-emption act provided the land should not be open to pre-emption where there was located "*known minerals.*" The court says in paragraphs 6 and 1 of the syllabus as follows:

“6. It is not sufficient to constitute ‘known mines’ of coal, within the meaning of the statute, that there should be merely indications of coal beds or coal fields, of greater or less extent and value, as shown by outcroppings. To constitute the exemption contemplated by the pre-emption act under the head of ‘known mines,’ there should be, upon the land, ascertained coal deposits of such extent and value as to make the land more valuable as a coal mine than for agricultural purposes.

“7. New discoveries, after the sale by which the land becomes profitable to work as a mine, cannot affect the title as it passed at the time of the sale.”

At the last of the opinion, the Court says as follows:

“A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, cannot affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale. If upon the premises at that time there were not actual ‘known mines’ capable of being profitably worked for their product so as to make the land more valuable for mining than for agriculture, a title to them acquired under the Pre-emption Act cannot be successfully assailed.”

Case of *U. S. v. Iron Silver Mining Company*,
128 U. S. 673, 32 L. ed. 571, is an action by the

United States to cancel certain patents issued under the placer mining law, alleging that they were obtained by fraud in that at the time of the application the lands were not placer mining ground, but contained veins and lodes of quartz and other rock bearing gold, silver and other metals. The question in the case was whether the determination of the character of the land could be determined as of the time of the issuance of the patent. Patents were issued under Section 2329 of the Revised Statutes, which provides:

“Claims usually called ‘placers,’ including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent. * * *”

The patent itself contained the following provision:

“FIRST: That the grant is restricted in its exterior limits to the boundaries of the tract described, and to any veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits which may hereafter be discovered within said limits, and which are not claimed or known to exist at the date thereof.

“SECOND: That should any vein or lode of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist

within the described premises, at the date thereof, the same is expressly excepted and excluded therefrom.”

The statute excluded from the placer mining laws such veins and lodes “claimed or known to exist” at the time of the application.

Section 8 of syllabus:

“It is not enough that there may have been some indications by outcropping on the surface, of the existence of lodes or veins of rock in place bearing gold or silver or other metal, to justify their designation as ‘known’ veins or lodes. To meet that designation the lodes or veins must be clearly ascertained, and be of such extent as to render the land more valuable on that account and justify their exploration.”

Section 9 of syllabus:

“The subsequent discovery of lodes upon the ground and their successful working does not affect the gold faith of the application. That must be determined by what was known to exist at the time.”

In the case of *Shaw v. Kellogg*, 170 U. S. 312, 42 L. ed. 1050, the question arose as to when the mineral character of the land was to be determined under a grant from Congress. By Section 6 of the Act making the grant, as quoted in the opinion, it is provided:

“Section 6. And be it further enacted, that

it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said tract of land as is claimed by the town of Las Vegas, to select, instead of the land claimed by them, an equal quantity of vacant land, *not mineral*, in the territory of New Mexico, to be located by them in square bodies, not exceeding five in number. * * *

Pursuant to this section, and other sections of the act, the heirs located their lands and filed their plats with the Land Department of the United States as provided by the Act, which were received and in some respects recognized, but no final approval and no patent was ever issued to the lands by the Land Department. Subsequently, mineral was found on one of the tracts. Action in ejectment was brought to recover possession of the land on which mineral was discovered. The opinion is by Justice Brewer and he states the contentions in the case as follows:

“These contentions are that Congress granted only non-mineral lands; that this particular tract is mineral land and therefore by the terms of the act is not within the grant. That no patent has ever been issued, and therefore the legal title has never passed from the Government. That the Land Department never adjudicated that this was non-mineral land, but on the contrary, simply approved the location, subject to the conditions and provisions of the

act of Congress, thereby leaving the question of title to rest in perpetual abeyance upon possible future discoveries or minerals within the tract."

The Court held (syllabus 1):

"The act of June 21, 1860, authorizing the heirs of Luis Maria Baca to select lands in the territory of New Mexico, instead of land claimed by them under the Mexican grant, with the approved survey and location therein required, made a full transfer of the title to them, having all the efficacy of a patent."

The approval of the plat in this case by the Surveyor General as was provided by the Act, stated it was "subject to the conditions and provisions of paragraph 6." The contention was made that this held the question of the mineral character of the land in abeyance until it should be finally determined by the Land Department as to whether it was mineral.

In passing on this question, the Court held (syllabus 2):

"The limitation of the approval entered upon the plat by the surveyor general under the direction of the Land Department, that it was 'subject to the conditions and provisions of paragraph 6' of said act, was a limitation beyond the power of executive officers to impose, and did not make the title conditional."

The latest declaration by the Supreme Court of the United States as to when the grant takes effect, is the case of *Wyoming v. United States*, 255 U. S. 489, Vol. 65, Law, Edition, p. 453, when published. Congress granted to the State of Wyoming certain school lands, same being sections sixteen and thirty-six in each township. By the Act of February 28, 1891, 26 Stat. L. 796, the State was invited and entitled, in the event any of the designated land in place as passed under the school grant should be included within a public reservation, to waive its right thereto and select in lieu thereof other lands or equal acreage, unappropriated, *non-mineral* public lands outside the reservation and within the State. The State under this Act waived its right to certain lands included in said reservations and filed its plats of selection of the lieu lands. After the filing of the plats, mineral was discovered on the tract involved, which was a part of the lieu lands selected. The court, in discussing this point, and in discussing the power of the officers of the Land Office to accept or reject under the act, says:

“In principle it is plain that the validity of the selection should be determined as of the time when it was made; that is, according to the conditions then existing. The proposal for the

exchange of land without for land within the reserve came from Congress. Acceptance rested with the state, and, of course, would be influenced and controlled by the conditions existing at the time. It is not as if the selection was merely a proposal by the state which the land officers could accept or reject. They had no such option to exercise, but were charged with the duty of ascertaining whether the state's waiver and selection met the requirements of the congressional proposal, and of giving or withholding their approval accordingly. The power confided to them was not that of granting or denying a privilege to the state, but of determining whether an existing privilege conferred by Congress had been lawfully exercised,—in other words, their action was to be judicial in its nature and directed to an ascertainment and declaration of the effect of the waiver and selection by the state in 1912. If these were valid then,—if they met all the requirements of the congressional proposal, including the directions given by the secretary,—they remained valid notwithstanding the subsequent change in conditions. Acceptance of such a proposal, and full compliance therewith, confer vested rights which all must respect. Equity then regards the state as the owner of the selected tract, and the United States as owning the other; and this equitable ownership carries with it whatever of advantage or disadvantage may arise from a subsequent change in conditions, whether one tract or the other be affected."

It cannot be denied that originally Congress had the disposition of these public lands. When it

relieved itself of this title, it went somewhere—both the legal and equitable title. It saw fit to grant the equitable title to the lessee and to the State the legal title, and to require of the State as the trustee between the government and the beneficiaries under the act, which in case at bar was the lessees, to do and perform certain things and to protect certain granted rights of the lessee. Clearly, if the naked legal title vested in the State the vested rights of the lessee were permanent. He had at that time, under the law in force, the preference right to release the land. Upon the passage of the Enabling Act, he had the preference right to buy, so that when the State of Oklahoma started to legislate, and the officers of the State started to operate under the laws of Congress and the laws of the State, they were charged with the execution of the agreement between the Government and the State.

In the Wyoming case, *supra*, the President attempted to withdraw the land in controversy as possible oil lands after it had been selected by the State, and the General Land Office attempted to reject and disapprove the selection of the State, and the Court in the syllabus states the law as follows:

“A state, having accepted the proposal of

Congress that, if any designated sections of public land passing under the school land grant in the state, should be included within a public reservation, it might waive its right to them, and select instead other vacant, unappropriated, non-mineral public land of equal acreage, under the direction of the Secretary of the Interior, and having complied with the terms of proposal, became invested with the equitable title to the selected land, and the Secretary of the Interior and the Commissioner of the General Land Office could not disapprove and reject such selection on the ground that the selected land was, two years later, included in a temporary executive withdrawal as possible oil land, under the Act of June 25, 1910, and still later was discovered to be mineral land; that is, to be valuable for oil. The validity of the selection must be determined according to the conditions as of the time when the waiver and selection were made."

In the case at bar, the school land lessee had selected his land when he executed his first lease. He had complied with all the provisions of law and was entitled to the benefit of the provisions of the law. As will be shown later in this brief, the State authorized and directed the Commissioners of the Land Office to sell the land in controversy. The officers of the State have failed and neglected to sell. In fact, they have attempted, as the Land Office did in the Wyoming case, to exclude the land from sale and divert it to dismemberment and exploita-

tion on shares. This they cannot do without violating the rights of the defendants.

Every case that we have been able to find holds that when a grant is made, that the character of the land must be determined as of the time of the grant. There is some difference in the cases as to when the grant is made, as under the Pre-emption case cited *supra*, the grant is not made until pre-emptioner is entitled to a patent, while under a grant, such as the case at bar and such as was in the case of *Shaw v. Kellogg*, *supra*, the character of the land is determined as of the date of the grant. The courts, from time immemorial have said that title to lands must be fixed and vested in somebody at all times, not held in abeyance, and if the construction we contend for cannot be placed upon the Enabling Act, then the title to the mineral lands or the title to the mineral rights in the land is flitting back and forth from time to time as speculators might believe or not believe the land to be mineral, or as actual operators might believe or not believe the land to be mineral, or as they might finally discover it to be mineral, or not mineral. While if the construction we contend for is placed upon the Enabling Act, the rights of every lessee, the rights of the State, are

definitely and certainly ascertainable, because they are all to be determined as of the date of the grant.

Other cases hold that the subsequent discovery of oil and gas made after rights to land have become fixed in settler or occupant cannot affect his right so attached prior to its discovery. In addition to the authorities heretofore cited on this proposition, are the following:

Diffenback v. Hawk, 115 U. S. 393, 29 L. ed. 423.

Davis v. Wiebold, 139 U. S. 507, 35 L. ed. 238.

Douer v. Richards, 151 U. S. 658, 38 L. ed. 305.

Saunders v. La Purisima Gold Mining Co., 57 Pac. (Calif.) 656.

We also desire to call the Court's attention to the case of *Green v. Robinson*, 210 S. W. (Texas) 498, and in the consideration of this case, we again call the Court's attention to the fact that Texas school lands were never owned by the government, but were owned by the state, so that a grant of the school lands under the Texas laws is the same as the grant by the United States to the state of the public lands in Oklahoma. In the one case the State of Texas was the original owner and in the other case the United States was the original owner. The

opinion is by Chief Justice Phillips and holds that where a purchaser from the state under act of April 12, 1883, of school land, not known to contain minerals, but fairly and in good faith classified and sold without reservation as agricultural land by the duly authorized state officers, he acquired title to minerals which might be thereafter discovered, and that the relator therein was not under the acts of the Thirty-third Legislature as amended in extraordinary session of such legislature, entitled to a permit to prospect on the land for oil and gas. The opinion of Mr. Chief Justice Phillips is a very able one, and we commend its careful consideration to the Court. We shall refer to it briefly upon two points. In the first place, attention was called to the condition under which settlers had entered upon the school lands. To use the language of the Court:

“Such settlers went upon this land relying upon the good faith of the State. It is public history that in many instances they have undergone a hard experience. As a rule they were poor men. Many of them have lived there under rude conditions. Through long years their right to all within their lands, save in *Shendell v. Rogan* and *Chappell v. Rogan*, where it was confirmed by this Court, was not challenged until apparently by the Act of 1913.

Now after all this time, when it develops that the lands have possibly become valuable, it is proposed to deprive them of that which makes them valuable. We do not believe the State should be permitted to so enrich itself at their expense. A law which would warrant such a result should, in our opinion, be so plain and unmistakable that no court in good conscience could refuse to give it effect. The school fund is a sacred fund and should be so cherished, *but the obligations, the good faith of the State, are equally sacred.* The enhancement of the school fund at their sacrifice would make it only improper. *These elements all enter into this case.* They do not change these acts of the Legislature, but they should be properly considered in any attempt to arrive at what the Legislature meant in their enactment. If this mandamus is granted, this land, under a permit issued in virtue of the Act of 1913, may, against the will of its owner, be turned into an oil field for the benefit of strangers. The best or most useful part of the surface may be made the field of mineral operations. * * * The character of the land as a farm—the purpose for which the State sold it—may be destroyed. The surface rights may be rendered no longer of use to the owner. It is possible for the surrender of his possession to be compelled. The mandamus was refused.”

In the Green case, *supra*, the Act of April 12, 1883, contained the following provision:

“The minerals on all lands sold or leased under this Act are reserved by the State for the use of the fund to which the land belongs.”

It was urged that by the express terms of the reservation there was no authority of law for the grant of that, which by the terms, was excepted from the grant, and, therefore, that the grant could pass no title on the subject of the exception. In answer to this, it was said that while the contention was plausible, it was not sound, and that it was not sound because its necessary result was to leave open for indefinite time—to all futurity—the determination of whether that which an ordinary grant of land purports to pass is within the exception. Quoting from the opinion:

“Under such a rule, the State might not know for fifty years whether minerals in fact existed in the land granted, and accordingly whether it had any right to them. By the same rule, the settler’s land would never be free from invasion under the right of the State to at any time in the future to explore it, and all of it, for minerals, or to authorize its exploration. He would never know when his right to undisturbed possession of even the surface had matured. In truth, it never would mature. The minerals, oil and gas are fugitive and vagrant in their nature. They percolate and wander beneath the surface of the earth. *Tex. Co. v. Dougherty*, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F, 989. They might not be in place in the land when it was granted. The land might not then contain them. It might happen, however, that at some remote period they would find

lodgment or form there. Yet, under such a rule, if they are then discovered,—the right to them which it is here claimed will attach whenever they are discovered—would be, not in the owner of the land, but in the State or some prospector holding a permit from the State. The law does not permit, nor can it wisely permit, the title to granted land or to any valuable substance contained in granted land to remain in any such state of indefinite abeyance. For actual rights to exist and for either governments or men to have security under them there must come a time when, if by their nature left uncertain, they shall be made certain. Under such a reservation as that of the Act of 1883, where there could be no right in the State to the minerals unless they in fact exist, there must be some point of time for determining whether they do exist, so that the State's right may be ascertained and reduced to certainty. And equally for the settler whom for its benefit and development the State encouraged and invited to convert a perilous frontier into a region of homes that it might some day become in itself the seat of empire, the thickly populated abode of a strong and devoted citizenship, there should be a time when he might know what rights his grant actually carried and whether he was secure in his possession of them.

“Were these important rights both of the State and the settler, to be left indefinitely contingent? Were they to continue in unlimited suspense? Were they to be determined by or be subject to the mysterious processes of natural forces beneath the surface of the earth at possibly remote periods in the future? It is

not conceivable that the Legislature so intended. If not, there being no express provision in the law on the subject, at what point of time did it intend that they should be determined? That is the real question which arises under this legislation. Its determination is conclusive of this controversy; and our own decisions, together with those of the United States Supreme Court, conclusively set it at rest. The reason for their holding, that under such reservations as this the minerals pass with the land if their existence in the land is unknown when the sovereignty confers its title, necessarily is that that is the best and fairest time for determining as to their probable existence, and is therefore the time which the law should adopt. Without other aid, it demonstrates the soundness of the holding. It reveals the justness of it. It commends it as having the essence of right and as being the inevitable decision of the question."

It is to be noted that under this case the Act of 1883, under which the State sold the land, expressly provided, that all minerals in the land should be reserved for the State. We have no such statute under our sale statute approved March 2, 1909, but instead, our statute provided for the sale of the mineral lands after January 1, 1915. And, while these lands were not mineral at the time of the passage of this Act in 1909, and should have been, under all the authorities heretofore cited, and

the Act of 1909, sold prior to January 1, 1915, they were by the Act required to be sold after January 1, 1915, if they had been mineral lands; so that our case is not involved with the legislative reservation that the Texas case was.

Our contention is that the character of the lands must be determined at the time of the grant, which we think was the *Enabling Act*.

Let us see what has been done by the State and its officials as to the determination of the mineral character of the lands involved:

First. By virtue of Section 10 of the *Enabling Act* they had the lands appraised for sale purposes January 12, 1909, which was known as the 1908 appraisement.

See appraisement, Record pages 98-99.

In this the appraisers show in questions, Record, p. 98, as follows:

"9. Any gypsum, cement, salt, mineral, gas or oil? No.

"10. Is land adjacent to mineral, gas or oil production? No."

Record, p. 99.

Actual cash value of land, \$3000.00.

Record, p. 100:

Total cash value of improvements, \$1290.00.

On March 25, 1909, the Commissioners of the Land Office by resolution approved this 1908 appraisal with exception of two quarters not here involved (Record, p. 101).

This certainly was a determination of the non-mineral character of the lands.

On August 30, 1915, the land was again appraised (Record, pp. 104-108) at \$2500.00 as its actual cash value, which was \$500.00 less than in Jan., 1909. Certainly there was not much oil value in the land then. Yet, on August 26, 1915, four days prior to the above appraisal, the Board attempted to rescind its former action in 1909 by its order segregating the lands involved (Record, p. 80).

Then on the 4th day of January, 1919, the Board executed the oil and gas lease to the Magnolia.

Questions naturally present themselves. Who held the preference rights from January, 1909, to August 26, 1915?

Where did it vest from August 26, 1915, to January 4, 1919.

Where is it vested now with the Magnolia operating under their lease?

Counsel have said Price will hold it when the Magnolia is through with the lands. If this be true, then the State can sell or trade off the timber rights, the sand rights, the stone rights, the gas rights, the oil rights, and every other element of commercial value, and, then, when entirely denuded, say to Price, "Exercise your preference rights now, on the worthless shifting sands and the worthless yellow clay, there is no further value in them."

Such a construction cannot be given to the Enabling Act and the Constitution accepting it.

Property or Vested Right in Preference Right.

In the light of all the legislation, both upon the part of Congress and upon the part of the State, up to and including the time of the authorizing of the sale of the lands involved by the Act of 1909, we must give these bodies credit with having knowledge of what the interest or property right of the lessee was as construed by the courts and considered by all persons dealing with the lands at the time.

One of the first cases determining the property

rights in a preference right is the case of *Noel v. Barrett*, 18 Okla. 304, 90 Pac. 12. This was an action by Noel, payee, of the promissory note to recover judgment against Barrett, the maker. Barrett pleaded "no consideration," alleging the note was given in consideration of the sale of the preference right to re-lease public lands. The court said in the first paragraph of the syllabus:

"By the law and regulations for leasing school lands in the Territory of Oklahoma, a lessee has a preference right to renew or re-lease, and such a right is a valuable one, subject to sale and purchase."

In the opinion the court says:

"This preference right is a valuable property right; in fact, experience and the general course of dealings in such lands has demonstrated that a preference of such leases are often of more value than the improvements on the lands, and such preference rights are the subject of sale and purchase, the same as titles to other lands."

If the preference right to re-lease is a valuable property right and a consideration to a promissory note, certainly the preference right to re-lease and to buy would be a valuable property right.

Our Court has recently followed the Noel case, and says:

“The nature of the preference right of a State land lessee is defined in *Noel v. Barrett*, 18 Okla. 304. It is said to be a valuable property right.

“Such preference rights are the subject of sale and purchase the same as title to other lands. It is clear that the preference right of a school land lessee to purchase the land is in legal effect an option. The lessee has a valid right to purchase an option and an option, even before election to purchase by the optionee, is held to create an equitable estate in the optionee.”

Clark v. Frazier (Okla.), 177 Pac. 589.

The case of *Twigg v. State Board of Land Commissioners* (Utah), 75 Pac. 729, holds:

“One who has purchased a possessory right from an original settler is entitled to the same privilege and benefits under Revised Statutes 1898, para. 2337, giving settlers of school lands, or those purchasing from them, a preference right to purchase on specified terms as his grantor would have had he continued in possession of the land and not parted with the interest therein.”

Under the Kentucky statutes, para. 4703, it is provided that actual settlers on vacant and unappropriated land should have a preference right to the land. Also provides that before any other person shall locate the same lands, three months

notice of such intention to do so must be given the actual settlers on the land. The court held:

“That without such notice, preference right could not be extinguished.”

Slusher v. Simpson, 67 S. W. 380, 23 Ky. Law Rep. 2252.

Compiled Laws of Kansas of 1879 provides that persons who “had settled upon and improved” or who are “actual settlers” upon school lands, were entitled to the right to purchase the same to the exclusion of others. *Held*, that an actual settler who was qualified was entitled to purchase the land.

Bratton v. Cross, 22 Kan. 674.

Other cases holding that the preference right is vested are the cases of *Wing v. Dunn* (Texas), 127 S. W. 1101; *White v. Douglass*, 11 Pac. (Calif.), 860.

In the very recent case entitled *Work, Secy. of the Interior v. United States Ex rel. McAlister, Edwards Coal Company*, this Court recognized the preferential right to purchase conferred by paragraph 4 of the Act of February 8, 1918, 40 Stat. L. 433, as a grant and granted to Coal Company relief prayed for in this action to protect their rights

given them under said Act. This opinion is not yet officially reported, but appears in 67 Law ed., page 640. Opinion is by the Chief Justice.

In the opinion the court says:

“We think that the preferential right of re-lator conferred by paragraph 4 of the Act of 1918 was not to be left to the legal discretion of the Secretary in the construction of this Act. There are not words to qualify that which the lessee has as a *right granted by the statute* or possessed in the Secretary the final discretion to determine or define that right.”

So in the case at bar, the State has no right to destroy or impair the preference right of Price and there is no room for construction of the Act so that any discretion in that regard is given to the State or the Board of Commissioners. They must preserve it and upon a sale he has the preference right to buy all of the lands.

Provisions in the Contract Between Officials Representing the Government, Concerning Public Lands, and Not Authorized by Law Are Unenforceable.

In the case of *Burke v. Southern Pacific Ry. Co.*, 234 U. S. 669, 58 L. ed. 1527, the court says:

“Lastly, it is urged that the railway company accepted the patent with the mineral exception therein and also expressly agreed that

the latter should be effective as one of the terms of the patent, and so is bound by it, or at least estopped to deny its validity. There are insuperable objections to this contention. The terms of the patent whereby the government transfers its title to public lands are not open to negotiation or agreement. The patentee has no voice in the matter. It in no wise depends upon his consent or will. He must abide the action of those whose duty and responsibilities are fixed by law. Neither can the land officers enter into any agreement upon the subject. They are not principals, but agents, of the law and must heed only its will (citing cases). Nor can they indirectly give effect to what is unauthorized when done directly. Of course, if they enter into any forbidden arrangement whereby public lands is transferred to one not entitled to it, the patent may be annulled at the suit of the government; but they cannot alter the effect which the law gives to a patent while it is outstanding."

The Burke case, *supra*, holds that the mineral character of the land must be determined as of the time of the grant. See also *Walpole v. Board of Land Commisisoners*, 63 Pac. (Colo.) 848 .

Subsequent Legislation Affecting the Rights of the Lessee Impair the Obligations of Contract.

In the case of *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, the Act of 1870 of the State of Oregon provided for the sale of certain State lands and gave the settler a certain length of time within

which to pay a part of the purchase price. Later an act under date of October 18, 1878, went into effect. The Act of 1878 provided for the cancellation of all certificates issued prior to January 17, 1879, and on this last date the settler in this case still had time within which to make his payment under the Act of 1870.

The question in this case was whether or not the subsequent legislation impaired the obligation of contract and whether or not the settler had such a fixed right or property right, which the subsequent Act could take away. The Court said in paragraph 7 of the syllabus:

“The Oregon Statute of 1887 which authorizes the cancellation of the Certificate of Sale where twenty per cent of the price of the land had not been paid before January 17th, 1879, impairs the obligation of a contract with the State which had been consummated by a compliance with the Act of 1870, and is therefore violative of the United States Constitution.”

In case of *State ex rel. v. Brown v. McPeak*, 47 N. W. 691, the law of the case, and sufficient fact for our purpose is stated in the syllabus:

“1. Under the act of 1879, the statute and leases made in pursuance thereof declared that the lessee will pay for the use of said lands the

annual rental of not less than 6 per cent per annum upon the appraised value thereof; that, at the expiration of five years from the date of the lease, and every five years thereafter, the land shall be appraised by three persons, one of whom shall be appointed by the county clerk, one by the lessee, and the third by the other two and that the valuation made by such appraisers shall, provided it be not less than the former appraisement, be the basis for the rental for the five years succeeding the next 1st day of January. *Held*, that, this being the contract authorized by statute, the legislature could not deprive the lessee of the right to select an arbitrator to act in conjunction with one selected by the state to appraise the rental value of the land for the succeeding five years.

“2. While the legislature may change or modify the remedy, it cannot, by a direct act, deprive the party of a substantial contract right.”

This opinion is written by Judge Maxwell, who was for many years the dean of the members of the Supreme Court of the State, and has always been one of the most highly respected judges in the State of Nebraska.

This case was again quoted by the Supreme Court of Nebraska in the case of *State ex rel. v. Thayer*, 64 N. W. 700.

In case of *Wing v. Dunn*, cited *supra*, 127 S. W.

1101, the courts of Texas said, first paragraph of syllabus:

“The right of a purchaser of timber on public lands under Sayles, Anno. Civ. Stat. 1897, Art. 4218Q, authorizing the sale of timber on public lands, to thereafter purchase the land on which the timber stood are contractual and vested and may not be impaired or taken away by future legislation, and where a purchaser of timber has a right under the statute to purchase the land on the terms fixed in the statute, his rights are not affected by the subsequent laws of 1901, though so intended by the legislature.”

In the case of *State ex rel. Miller, Attorney General, v. Buttzville State Bank*, 144 N. W. (N. Dak.) 105, the law stated in the syllabus is as follows:

“A state bank failed in July, 1910, having \$1,207.80 of money belonging to the State of North Dakota upon deposit therein. Upon that date section 7387, R. C. 1905, gave the State a preference right in making distribution of the assets of said bank, but this preference was taken away by chapter 101, S. L. 1911, which, however, only became effective July 1, 1911. Under these facts, held:

“That the repeal of the preference right in 1911 did not operate to defeat the claim of the State which had accrued at the time of the failure of the bank in 1910, and that the Dakota Trust Company, which had been surety upon

the bond of the bank and had paid the State the amount of the deposit, was subrogated to all the rights of the State, and should be paid under said chapter 7387, R. C. 1905."

Other cases are *Graded School District No. 2 v. Trustee of Bracken Academy*, 26 S. W. (Ky.) 8; *State v. Richman Ry. Co.*, 73 N. C. 526, 21 Am. Rep. 473.

While it is true that Section 1 of the Act appearing Session Laws 1907-08, page 486, in speaking of mineral lands provides that:

"All such mineral interests shall be reserved from sale until the year 1915, and for such additional period of time as may be determined by law."

And Section 1 of the Act appearing in the Session Laws of 1907-08, at page 490, in speaking again of the segregation of mineral lands, says:

"Such segregation of such deposits shall conclusively withhold the same from sale, lease or other alienation, except as provided in this act."

And both of these acts were approved May 26, 1908, and both of them carried the emergency section, yet under the record in this case, the lands in controversy were not known to be mineral, nor deemed valuable for mineral at state-

hood, nor at the time these two acts were passed and not until after the commencement of this suit were they known to be mineral. Consequently, under our theory of the case, these two sections do not apply to the lands involved. Yet, if they did apply, they were repealed specifically by the Legislature in the Act approved March 2, 1909, appearing at page 448 Session Laws 1909; the first section providing for the sale of all lands in section thirty-three, including townsite and minerals lands, showing that the Legislature of 1909 legislated on the subject of sale of all the lands, and they are specifically repealed by Section 18 of this Act, appearing page 458, where it reads:

“All acts and parts of acts in conflict herewith are hereby repealed.”

It is our contention by the Act of 1909, that the State, through its Legislature, elected to convert the trust estate consisting of sections thirty-three and indemnity land, from the land itself to money under the terms, provisions, and limitations of the Enabling Act. That the Act of 1909 created a contractual relation between the defendants Price and the State, and that any subsequent legislation could not affect their rights, and would impair the obligation of contract.

**The Oil and Gas Lease Executed in This Case Grants
An Estate or Interest in the Lands.**

On the character of the estate or interest which the Commissioners of the State Land Office purport to give to the proposed oil lessee, it has been suggested, and we apprehend will or may be contended, that such "oil and gas lessee" does not acquire an ownership or interest in the land. On this, we have cited hereinbefore the terms of the instrument which purports to demise and grant "all the oil deposits and natural gas in or under" the land.. We have cited *Texas Co. v. Dougherty*, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F 989, wherein was given a careful discussion of oil and gas contracts. There, as here, the contract contained the word "grant" of all the "oil, gas, coal and other minerals *in or under* the particular tract of land" and the court held that it was a *conveyance* of the property and privileges vested in the grantee a defeasible fee in the:

"Oil and gas in the ground so as to render it taxable to him, and that oil and gas in place beneath the surface are capable of conveyance as realty separate from the surface."

This is a very learned opinion and cites the best authorities on the proposition, to wit: *Ohio*

Oil Co. v. Indiana, 177 U. S. 190, 44 L. ed. 729, holding:

“The right to oil and gas beneath his land is an exclusive and private property right in the land owner * * * of which he may not be deprived without taking of private property.”

Then, of course, lessee's preference right to buy the land extended to all, including gas and oil.

Also, Thornton on Oil and Gas, Section 19:

“Oil and gas until severed from the realty, are as much a part of it as coal or stone. * * * They must be treated as a part of the surface underneath which they lie.”

Also, Thornton on Oil and Gas, Section 20:

“The owner of the surface is the owner of the oil and gas beneath. * * * They are the subject of grant and conveyance as coal or stone.”

Gould on Waters, Section 291, says:

“Subterranean water and likewise oil, is included in comprehensive idea which law attaches to land, and that a lease for the purpose of mining oil, coal, rock, carbon, oil bases a corporeal interest subject to an action of ejectment to the same effect as *Heller v. Dailey*, 28 Indiana Appeals 555, 63 N. E. 490, and other cases cited.”

Even in Illinois and other states holding that

these minerals in place are not capable of distinct ownership, and that a conveyance of them is not a grant of the minerals themselves in the ground, but only such part thereof as the grantee may find; yet that Court held:

“That such a conveyance was the right to go upon the land and occupy it for the purpose of prospecting, if of unlimited duration, or if such right under the terms of the lease is capable of having unlimited duration amounts to a grant of the freehold in the land. *Gruener v. Hicks*, 230 Ill. 536 82 N. E. 888.”

In *People ex rel. Carrell v. Bell*, 237 Ill. 332, 19 L. R. A. (N. S.) 746, 86 N. E. 593, the question was directly involved:

“Of whether the right created by such a conveyance amounts to an interest taxable as a grant against the grantee separate from the fee taxable against its owner. The conveyance was of the oil and gas against a certain tract of land for the consideration of the payment of the royalty to the grantor; the premises to be held for one year and so long thereafter as oil or gas might be found thereon in paying quantities, constituting, as is the case in the instrument before us, a term capable of unlimited duration. * * * The Court held that the grant amounted to a freehold interest which should be taxed and assessed against the grantee.”

The court saw and distinguished in the Daugh-

erty case between instruments of grant, and instruments that convey no property interest:

“But only a bare right or privilege to go on the land and mine for minerals and reduce them to possession.”

Such is the instrument involved in *National Oil Company v. Teel*, 95 Texas 586, 68 S. W. 579. Of course, that distinction arises entirely from the language of the instruments which every careful Judge observes. The language used in instruments, whether language of permission, or language of license, or language of pledge, or language of conveyance is always distinguished; and whether or not the term is of definite or indefinite duration is judged by each instrument.

In the Daugherty case the Court cites and discusses *Southern Oil Co. v. Colquit*, 69 S. W. 169, involving:

“The question of whether the proper joinder of wife was necessary in the conveyance of such minerals in place under a tract constituting a homestead, together with a right to make use of the land for the purpose of their production from the earth.”

It will be noted this is almost identical with

the instrument involved at bar. The Texas Court held that it was necessary to join his wife,

“for the reason that such a conveyance amounted to the conveyance of an interest in the land itself. This Court refused writ of error (Texas Supreme Court). It could have done so only under the view that the interest created by the instrument was an interest in the realty itself, requiring for its validity the joinder of the wife because of the homestead character of the realty.”

The Court further said:

“Here the instrument expresses a present grant of the minerals in place for a consideration which was valuable and independent of any obligation resting upon the grantee.”

The Supreme Court of the State of Oklahoma in *Hoyt v. Fixico*, 175 Pac. 517, — Okla. — (not reported), said at page 518, column 1:

“That the Circuit Court of Appeals in *Parker v. Riley*, 243 Fed. 42, 155 C. C. A. 572, had occasion to construe the Act of May 27, 1908, with reference to an oil and gas mining lease and reached the conclusion that a lease of a restricted homestead for oil and gas or other mining purposes under section 2 of said Act, *was an alienation of that part of the land constituting the homestead which the lease permits the lessee to take from it by the discovery and removal of oil and gas and other minerals therein.*”

And says otherwise:

“Would defeat the purpose and intent of Congress, for any full-blood heirs would thus be enabled to dispose of their most valuable property right without the protection which the government intended they should have.”

And again:

“While, strictly speaking, an oil and gas mining lease does not convey an estate in the realty prior to development of the leased premises, it operates to pass the immediate and exclusive right of possession of the land for the purpose named in the lease, and upon discovery of oil and gas, or either of them, the lessee acquires a vested right to extract and remove from the premises and apply to his own use the oil and gas found therein, and such a lease is an alienation of that part of the land which the lessee takes from it, converts into personal property and appropriates to his own use.”

This Court evidently restricts this opinion to “leases” strictly speaking, and distinguishable from “grants” in place with permission to take, as the instrument at bar was carefully made to be. It will be noticed from the lease proposed to be granted here, that under the language of the decision above quoted, it would:

“Pass the immediate and exclusive right of possession of the land for the purpose named in the lease.”

This can not be other than an invasion of the right of possession of the lessee and an invasion of his preference right to purchase that very privilege, interest or estate (whatever it may be called) as against all the rest of the world, secured to him by the Enabling Act; and if such a lease

“Is an alienation of that part of the land which the lessee takes from it,”

it must likewise and necessarily deprive the lessee of the preference right to buy and hold for his own use under the preference right, given him by the Enabling Act, of that very thing which this instrument undertakes to take away from him.

In *Fixico* it is said:

“The Supreme Court of the United States in *United States v. Noble*, 237 U. S. 74, 59 L. ed. 844, held that the assignment of rents and royalties accruing under an oil and gas lease, was a ‘conveyance of an interest in the land,’ and that the lessee had no power to convey his interest in the land, had no power to convey that part of it which consisted of rents and royalties” (175 Pac. 518).

These decisions are conclusive from our two highest courts. If the lessee’s seven-eighth oil, and the royalty reserved in oil and gas conveyance, is an interest in the land, it is impossible to logically

and honestly say that the Board, or the State, can give away seven-eighths of the value to secure the one-eighth; just as Texas said, *supra*. Or, to quote the Texas Supreme Court:

“In other words it conveys the substances named themselves in the ground and not simply the right to take them from the ground.”

Texas Company v. Daugherty, supra.

The difference in the estate conveyed depending on the difference in the language of the instrument must be kept ever in mind in reading the decisions relating to various oil and gas contracts. Here the board essayed a straight grant of the oil and gas “in and under” the land for one-eighth of it. A present grant of the thing, to be paid for by subsequent payments, of portions thereof; an instrument of conveyance.

From this line of authorities, it is clear that four points are settled: That an instrument, like the Magnolia lease, is, if valid, a conveyance of a part of real estate. That it operates to pass the immediate and exclusive right of possession of the land for these purposes, and is an invasion of the former lessee's property. That it is a conveyance of part of real estate for other than money, to wit,

a percentum of the value, and a diversion of the proceeds from its dedicated purposes. That it is, therefore, void.

Legislature Can Not Delegate the Power Given it by the Enabling Act and the Constitution.

A very interesting case on this subject, as well as other subjects heretofore discussed in this brief, is the case of *Walpole v. State Board of Land Commissioners*, 163 Pac. (Colo.) 848.

The *Colorado Constitution, Section 10 of Article 9*, is as follows:

“It shall be the duty of the State Board of Land Commissioners to provide for the location, protection, sale or other disposition of all the lands heretofore, or which may hereafter be granted to the State by the general government, under such regulations as may be prescribed by law; and in such manner as will secure the maximum possible amount therefor.
* * * The general assembly shall provide for the sale of said lands from time to time; and for the faithful application of the proceeds thereof in accordance with the terms of said grants.”

It is to be noted that by this section of the Constitution, the Board of Land Commissioners were mentioned and given some authority by the Constitution, while under our Constitution, no mention of them was made.

Pursuant to this section of the Constitution, the legislature passed an act which appears at Section 5185 of Revised Laws of Colorado, and is as follows:

“* * * Whenever a purchaser of any state land, state has complied with all the conditions of the sale, and paid all purchase money with the lawful interest thereon, he shall receive a patent for the land purchased; such patent shall be signed by the governor, attested by the secretary of state, and countersigned, by the register, and have the great seal of the state and the seal of the state board of land commissioners thereto attached; and when so signed, such patent shall convey a good and sufficient title in fee simple.”

Section 5 of the Act approved March 2, 1909, appearing at Session Laws 1909, page 453, reads as follows:

“The state shall have first lien upon all lands sold under this act, together with all improvements and appurtenances thereunto belonging until all payments, both principal and interest, are made thereon, and upon such payments being made, the Commissioners of the Land Office, in forms of law, shall execute to each purchaser as in this act provided, a patent in fee simple; provided, a certificate of purchase, reciting the conditions of such purchase, shall be issued to every purchaser under this act immediately upon execution of the contract of purchase and such certificate of purchase shall

be entitled to record, as evidence of the same, under the provisions of the law of conveyance."

It will be noted that Section 5185 of Revised Laws of Colorado and Section 5 of the Oklahoma Laws of 1909, are identical in meaning; each of which contemplated conveyance of title in fee. Pursuant to the Constitution and laws of Colorado, the State Board of Land Commissioners proceeded to sell the particular tract of land, and in the notice of sale, they put the following provision:

"Reserving, however, to the State of Colorado, all rights to any and all minerals, ores and metals of every kind and character, and all coal, asphaltum, oil, and other like substance, in and under said land, and the rights of ingress and egress, for the purpose of mining, together with as much of the surface of the same as may be necessary for the proper and convenient working of such minerals and substances."

At the time of this sale, the plaintiff was present and purchased the quarter section and made the first payment and arranged for payment of the land in annual installments and received the certificate of purchase in which was printed the reservation as it read in the notice. The sale and purchase was made November 3, 1909. In December, 1910, the State Board executed a mining lease to

one Kirchhoff to the lands in controversy. In discussing the case, the Court said:

“Under this section of the Constitution, the board does not in any sense stand in the position of an owner. It is a mere agent, with a duty to do no less, and power to do no more, respecting the disposition of State lands under its control, than is provided”

by law. The Court then takes up what is meant in the various sections of the statutes providing for the sale of “lands.” The Court, in discussing the authority of the Board, states as follows:

“Where the policy of the law and its command is that a purchaser of public lands shall receive a good and sufficient title in fee simple, surely officers charged with the administration of the law cannot lawfully agree to or convey, any other title, because the express mandate is an implied prohibition against any other manner of disposition. Nor can a purchaser, by agreement or acquiescence, clothe land officers with such authority, because that which is inhibited by law can never be made lawful by consent of the parties affected. When a patent is issued, it must be deemed the grant of a good and sufficient title in fee simple, and if it contains any reservations or exceptions which are inconsistent with or repugnant to the grant of such an estate, they must be held to be invalid under the rule which declares that reservations or exceptions which are repugnant to the grant are void. 15 Cyc. 675.

“We conclude, therefore, that where state lands are sold, the Board has no authority to sell less than the whole, and until authority is given it to sell less, like surface rights, or other partial interest, it may not do so. The Constitutional provision which establishes the land board also places its control and regulation with the legislative department of government, and the board can act only within the limits and in the manner prescribed by that body. As the law does not vest the land board with authority to make any reservation when it sells state lands, the one attempted in the contract here involved is a nullity, and without effect for any purpose.”

The Court, in the syllabus, laid down the law as follows:

“1. Under Const. Art. 9, para. 10, requiring the State Board of Land Commissioners to provide for the sale, etc., of state lands as may be prescribed by law, the board’s powers are strictly limited by statute.

“2. Under Rev. St. Paras. 5167, 5185, providing the conveyance of state lands shall vest a title in fee or fee simple, the State Board of Land Commissioners has no power to reserve the mineral rights in such conveyances, and such reservation is void.

“3. A purchaser’s knowledge that a mineral reservation would be incorporated in his conveyance from the state, his payment of purchase-price installments after knowing state officials had granted a mining lease covering his property, and his application for such a lease

do not estop him from contesting the validity of such mineral reservation.”

Our Court, in the case of *Betts v. Commissioners of the Land Office*, 27 Okla. 64, 110 Pac. 766, had occasion to discuss the power of the Board.

The question arose in this case as to what power and authority the Commissioners of the Land Office had to pay employees in running the department, and from what funds they should be paid. The Court, in the opinion, quotes the Colorado Constitution heretofore quoted in the Walpole case and also the Colorado cases construing that provision of the Colorado Constitution and discussing the power of the legislature to delegate any of its powers, to the Board, the Court says:

“The first legislature of the state passed an act entitled ‘An act to confer on the Commissioners of the Land Office, consisting of the Governor, Secretary of State, State Auditor, Superintendent of Public Instruction and the President of the Board of Agriculture, authority to manage, loan, invest and regulate the investment and deposit of the permanent school funds.’ See Sess. Laws 1907-08, pp. 664, 665. And Section 4 of said act provides: ‘The Commissioners of the Land Office may appoint such assistants and incur such expenses as are necessary in the management and handling such property and funds, and shall pay such ex-

penses out of the *income of the school funds.*' Said section is repugnant to the Constitution for several reasons: (1) It attempts to confer or delegate legislative power, which was by the terms of the Constitution lodged in the legislature, upon said board, so as to authorize it to determine the number of employees needed and fix their salaries. This is not permissible as to enactments by our state legislature since the organization of the state government. *State ex rel. Rush v. Budge et al., State Capitol Com'rs*, 14 N. D. 532, 105 N. W. 725. See, also, *Cutting v. Taylor*, 3 S. D. 11, 51 N. W. 949, 15 L. R. A. 691. (2) It attempts to authorize the expenditures of a part of the interest of the permanent school fund as constituted by Sec. 2, Art. 11, Const., to pay the expenses of loaning, investing, or reinvesting same, which is not permissible. (3) It attempts to make an appropriation without complying with the requirements of section 55 of article 5 of the Constitution. See *Menejee, Treasurer, v. Askew, etc.* (decided at this term, but not yet officially reported), 107 Pac. 159. On March 22, 1909, the second legislature enacted an act entitled, '**An act providing for the manner of procedure in leasing the public lands of the state and declaring an emergency.**' See Sess. Laws 1909, pp. 440-448. By the terms of this act rules and regulations were provided for the manner of procedure in leasing such lands, but no provision was made relating to the payment of the expense of the leasing of the same. Everything else was done in order to comply with the requirements of section 10 of the enabling act except to provide for the payment of the expenses of the leasing department by means of

an appropriation. And so, with the adjournment of the second legislature, the provision that was brought over from the Territory of Oklahoma under the terms of section 10 of the enabling act, relating to the payment of the necessary expenses and costs of the leasing of said land, still remained in force."

By analogy, many paragraphs of the syllabus and the opinion are instructive on the case at bar, for the reason that all through the opinion the state is treated as a trustee and not the owner of the land and the Board of Commissioners is treated and determined to be an agent of the trustee. Also the entire opinion gives full effect to every provision of the Enabling Act relative to the lands, and relative to the fund, and determines that the Board would have no power to expend money with or without legislative enactment that would violate the provisions of the Enabling Act.

In the case of *Haskell v. Haydon*, 126 Pac. 232, 33 Okla. 578, the Court had under consideration the question of whether or not Haydon had a preference right to buy, under the act approved March 2, 1909, 640 acres of land instead of 160 acres; and in the discussion of that question it was necessary to construe the provisions of the Enabling Act and the Constitution, concerning the public lands; par-

ticularly Section 33, and indemnity land. They recognize in this opinion, and so state the law, that the Constitution requires the land to be sold under the provisions of the Enabling Act "for the uses and purposes and under the conditions and limitations for which the same were granted and donated." They recognize and enforce the provisions of Section 9, which provides those tracts shall be sold "under such rules and regulations as the legislature of said state may prescribe, preference right to purchase at the highest bid being given to the lessee." And the third paragraph of the syllabus holds that the exclusive power to make rules and regulations is with the legislature; said Section 3 of the syllabus reading as follows:

"Section 4, Art. 11, of the Constitution, confers upon the legislature exclusive power to prescribe, 'in conformity with the regulations of the enabling act,' rules and regulations for the sale of all public lands set apart to the state by congress, and all lands taken in lieu thereof, for charitable, penal, educational, and public building purposes."

A number of cases can be found construing the provisions of various enabling acts in which it is held that the provisions of the enabling act, di-

recting the protection of the funds derived from the lands granted, are controlling.

State ex rel. v. Millau, 96 N. W. (N. Dak.) 310.

Betts v. Commissioners of the Land Office, 110 Pac. 766, cited *supra*, 27 Okla. 64.

Haskell v. Haydon, 33 Okla. 578, 126 Pac. 232.

A late case is the case of *Erview, Commissioner of Public Lands of New Mexico v. United States*, 251 U. S. 41, 64 L. ed. 128. In this case the legislature passed an act providing that three cents on the dollar of the annual income from sales and leases of public lands which were granted under the enabling act, should be used for the purposes of making known the resources and advantages of the state generally, and particularly to homeseekers and investors. The United States brought an action to enjoin the diversion of the funds and the Supreme Court of the United States sustained the action. If the diversion of this small amount of money, which might reasonably be expected to cause the increase in the demand, and probably the enhancement of value of the remaining lands in the state and thereby permit the state to obtain a greater amount of money for its total acreage of lands, is

violative of the provision of its enabling act, certainly any legislation by our state that would permit the bartering and giving away of seven-eighths of the oil interest in the land in consideration of its development and the bonuses paid would be violative of the terms and provisions of our enabling act. It is apparent from this case that it is not a question of whether or not it would be good business judgment, nor is it a question of whether or not the appropriation in such manner might or might not be advantageous to the fund; but it is the language of the enabling act that controls and the state is not permitted to violate it. So it is our contention that the state could only lease lands known to be mineral at the time of statehood for the limited period of five years, and that the sale contemplated by the enabling act and the Constitution was a sale of the lands and not a bartering and giving away of the most valuable element of mineral land.

**Defendants Are Entitled to Protect Their Possession
by Injunction.**

In the cross-petition of defendants, they have asked for an injunction against plaintiff and intervenor, enjoining them from interfering with their possession.

In case of *Schwab, Co. Treas., v. Wilson*, 84 Pac. (Kan.) 124, the Court says:

“It is seriously urged, however, that Wilson, plaintiff below, can not maintain this action because he has no interest in the land in controversy peculiar to himself and different from the interest of the public generally. When a man settles upon school land with the intention of becoming the purchaser, and erects improvements thereon of the value of one thousand dollars, including a permanent dwelling and occupies the land as a home for himself and a large family, and says it is the only home he has and all he has in the world in the way of property, it would seem he has such an interest in the land from that enjoyed by the public generally as will entitle him to enjoin an officer from selling it.”

In this case, Wilson was the settler on the land, and as such had the right to purchase. The county treasurer attempted to sell the land as lease land which was alleged to be in violation of the rights of Wilson. This action was brought to enjoin him. The Court declares the law in the syllabus, to be in substance as stated in the opinion above quoted.

The pretended order of segregation in this case was not made until August, 1915. The lease between the intervenor and plaintiff was not made until 1919. The attempt to take possession was not

made until 1920. At all times Price was in possession and under the exclusive control of the lands in controversy. The plaintiff was charged with notice of whatever rights of claim defendants had to the lands by reason of such possession.

The courts have always protected the possession by injunction of the person claiming under any of the laws of Congress authorizing the settlement, or acquiring of the title, or any similar state laws, or of a person claiming title thereto not directly under any legislative enactment and in possession thereof.

Pennoyer v. McConaughy, 140 U. S. 1,
35 L. ed. 363.

Burnett v. Sapulpa Refin. Co., 159 Pac.
(Okla.) 360.

Atherton v. Fowler, 96 U. S. 513, 24 L.
ed. 732.

Payne v. Cen. Pac. Ry. Co., U. S. Sup.
Ct. Adv. Op. No. 10, dated April 1,
1921, at page 344.

**Price Has Preserved His Rights and Done All Re-
quired of Him By Law.**

Counsel have heretofore urged the Frisbie and Hutchins cases quoted below as supporting the theory that there is no vested right to the public lands in Oklahoma, in the lessee; and in the consider-

ation of these cases, together with other cases in the Supreme Court of the United States, it is necessary to refer to the legislation they were construing at the time that the opinions were written.

By Section 3 of Article 4 of the Constitution of the United States, it is provided:

“Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States.”

In the case of *Frisbie v. Whitney*, 9 Wal. 187, 19 L. ed. 668, the controversy arose under the provisions of the Act of Congress approved September 4th, 1841, found 5 Stat. L., page 453, Section 10 of this Act appearing in Vol. 5 Stat. L., page 455, designates the class of persons who may enter and their qualifications and requires that they must have made a settlement in person since the first day of June, 1840, or after the passage of the Act, and provides such person shall inhabit and improve the same and has, or shall, erect a dwelling thereon, he then shall be, and is hereby

“Authorized to enter with the Register of the Land Office for the district in which such land may lie by legal sub-divisions any number of acres not exceeding one hundred sixty, or

a quarter section of land, to include the residence of said claimant upon payment to the United States the minimum price of such lands *subject, however, to the following limitations and exceptions.* * * * No lands included in any reservation by any *treaty, law or proclamation of the President* of the United States, or reserved for saline, or for other purposes. * * *

Many other exceptions and limitations are named in the Act, but this one quoted serves the purpose for illustration and is the one particularly applicable in considering this case. It will be noted from a reading of the Act that *the entry* under the Pre-emption law called for, is the filing of their claim and payment of the money in the Land Office and is not *the settlement* on the lands.

Section 14 of the Act appearing page 457, reads as follows:

“That this Act shall not delay the sale of any of the public lands of the United States beyond the time which has been or may be appointed by the Proclamation of the President, nor shall the provisions of this Act be available to any person or persons who have failed to make the proof and payment and file the affidavit required before the day appointed for the commencement of the sales as aforesaid.”

Section 12, at page 456, provides that the proof of settlement and improvements must be made to the

satisfaction of the register and receiver before the entry is made under the Act.

The land involved in the Frisbie case was for many years thought to be a tract of land granted to one Vallejo by the Mexican Government, but by decision of the Supreme Court of the United States, this grant was held to be void. When this decision became known, a mad scramble took place to gain possession of the land under the Pre-emption law and attempting thereby to dispossess the persons who had held the land for years under a chain of title from Vallejo. Frisbie held possession of the land by reason of the chain of title from Vallejo. A short time after this decision, Congress passed an act for the protection of the persons claiming under Vallejo. Under this act, Frisbie made his entry and complied with its terms and Whitney sought by this action to compel Frisbie to convey him his title so received from the Government under the claim that the land was open to the Pre-emption laws and he had made settlement thereon under the Pre-emption laws. Whitney applied to the land office and offered to make his declaration on the grounds only that he had come on the land, built a house and barn and perhaps enclosed some of the land, mak-

ing no payment or other proof. They refused to receive it; first, because no surveys had been made by which the land could be identified and afterwards the remedial acts passed by Congress. Whitney never paid money to the Government and never received his certificate of entry. Under this state of fact, the Court held:

“That settlement on the public lands of the United States, no matter how long continued, confers no right against the Government. The land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvements and has paid the requisite purchase money. Rights created by the statutes must be governed by their provisions, whether they be hard or lenient.”

In the case of *Hutchins v. Low*, 15 Wal. 77, 21 L. ed. 82, Congress had passed an Act in June, 1864, granting to the State of California, the famous Yosemite Valley, to be held by the state in perpetual reservation for certain expressed uses. By legislative enactment the State of California accepted the same with the reservations, stipulations and conditions contained in the Act of Congress. Six weeks previous to the passage of the Act granting the lands to California, Hutchins entered the valley and settled upon the lands therein under the Pre-

emption laws of the United States and purchased certain improvements which were then on the land. The valley at that time was unsurveyed and no other act was done by Hutchins to acquire the title except to solicit the state and Congress to recognize his claim. Under this state of facts, he attempted to hold the lands and claim title thereto.

This case, like the Frisbie case, simply holds that Hutchins had no rights vested in him under the Pre-emption law for the reason that he had not yet put himself in a position to demand title under the Pre-emption law. He had simply filed his declaration; he had not submitted his proof, he had not paid the purchase price; his entry had not been accepted by the Land Office and, as it stated in this case in referring to the Lytle case, the Court said:

“In the case from Arkansas, the right of Cloyes had been defeated by the failure of the executive officers to perform their duties under the law; he having complied fully with its provisions except so far as he was prevented by such failure, and having thus acquired a right to the title of the Government, in the present case, no default on the part of the executive officers is alleged or pretended. The ground of complaint is that the defendant could not acquire title under the Pre-emption laws, because Congress had granted the land to the state and

thus withdrawn it from sale. In the one case *it is the action of the executive officers* which is the ground of complaint; in the other it is the *action of Congress.*”

This is an exact statement of the conditions of which we are complaining in the case at bar. Here the state has directed the sale of the Price land. The officers have failed to perform their duty under the act by selling the lands. If the state in the case at bar owned the lands without limitation or exception as the Government did in the Yosemite Valley case, and had simply passed an act saying that when a settler had done certain things and filed certain proofs and paid certain moneys, it would convey him a title; then these cases would be in point in the case at bar, but the state here in the first place could not do so and comply with the terms of the Enabling Act, and in the second place, they have absolutely directed the sale of the lands in controversy.

The case of *Lytle v. The State of Arkansas*, 9 How. 333, 13 L. ed. 153, is discussed at length in the case of *Hutchins v. Low*, *supra*, and the distinction is very clearly brought out.

In the Lytle case certain lands were by virtue

of the Pre-emption Act of May 29, 1830, conferred upon settlers upon proof and settlement, and improvements made to the satisfaction of the register and receiver. The proof in this case was taken and the money was paid and received by the Land Office and the Court held that no subsequent act of Congress could take away the right of the Pre-emptor. In other words, the Court held in the Lytle case that the bargain had been made and that it was binding on both persons. So we contend in the Price case.

The case of *Burton v. Traver*, 130 U. S. 232, 32 L. ed. 920, is a case arising under the Pre-emption laws. The Court very clearly reviews the situation of the settler under the Pre-emption laws and the United States in the following statement in the opinion:

“Neither of these grounds is well taken. No portion of the public domain, unless it be in special cases not affecting the general rule, is open to sale until it has been surveyed and an approved plat of the township embracing the land has been returned to the local land office. A settlement upon the public lands in advance of the public surveys is allowed to parties who in good faith intend, when the surveys are made and returned to the local land office, to apply for their purchase. If, within a specified

time after the surveys, and the return of the township plat, the settler takes certain steps, that is, files a declaratory statement such, as is required when the surveys have preceded settlement, and performs certain other acts prescribed by law, he acquires for the first time a right of pre-emption to the land, that is, a right to purchase it in preference to others. Until then he has no estate in the land which he can devise by will, or which, in case of his death, will pass to his heirs at law. He has been permitted by the government to occupy a certain portion of the public lands and therefore is not a trespasser, on his statement that when the property is open to sale he intends to take the steps prescribed by law to purchase it; in which case he is to have the preference over others in purchasing, that is, the right to pre-empt it. The United States makes no promise to sell him the land, nor do they enter into any contract with him upon the subject. They simply say to him—if you wish to settle a portion of the public lands, and purchase the title, you can occupy any unsurveyed lands, which are vacant and have not been reserved from sale; and when the public surveys are made and returned the land not having been in the meantime withdrawn from sale, you can acquire, by pursuing certain steps, the right to purchase them. If those steps are, from any cause, not taken, the proffer of the government has not been accepted, and the title in the occupant is not even initiated. The title to the land remains unaffected, and a title in the occupant is not even initiated. The title to the land remains unaffected, and subject to the control and disposi-

tion of the government, as before his occupancy."

The Court here specifically recognizes the fact that under the pre-emption laws, only surveyed lands were subject to it, and that until they are surveyed they would not apply. No such condition is in the case at bar. After they are surveyed and the returns made of the survey, the settler must take certain steps; that is, file his proof, etc. There is nothing of that kind required of Price. Certainly, it would not be contended that Price's property interest in the lands involved here is not subject to sale or capable of being devised by will, or in case of his death, pass to his heirs at law, because each case that our court has passed upon has recognized the property right in both the right to re-lease and the right to purchase at the time of sale.

It is also noted that this case gives full effect to the proviso of the pre-emption law under consideration, providing that the entry shall not be permitted if the lands have *been withdrawn by law, treaty or proclamation of the President*. There is no provision of our law permitting these lands to be withdrawn from sale excepting that provision in the Segregation statutes of 1907-08 which was repealed

by the Act of 1909, and which violates the provisions of Section 8 of the Enabling Act when applied to lands not then known to be mineral, and after our rights had become thus fixed, they could not, afterwards, be taken away from us.

Upon the consideration of these cases, it should be noted that counsel has not attacked the findings and judgments of the Court except on the law, and that the *Court has found that the Prices have done all that was required of them under the law to do.* A very pertinent question was propounded to counsel by the trial court in the hearing below when he asked "if the Board had the power to segregate lands at any time and without hearing, would not such administrative order have the effect of repealing the Act of the legislature directing the sale? And, could not the board segregate all state lands arbitrarily, thereby prevent the sale of any of them, and thus defeat the sale statute?"

The Lytle case, quoted, *supra*, has been cited and followed recently by our Supreme Court. The case of *Payne v. Central Pac. Ry. Co.*, 255 W. S. 228, was a case where the railway company was permitted under the Granting Act to select lien sections

for sections lost under the grant of specific sections by reason of some prior appropriation; and the Act provided that the same should be subject to the approval of the Secretary of the Interior. The railway company selected its lands and filed its list; the president attempted to subsequently withdraw some of the lands as a water power site under the Act of June 25, 1910, and thereafter the secretary refused to approve the list. The Court, in discussing the case, says:

“It is not questioned that, had the selection been reached for consideration before the withdrawal, it would have been the duty of the commissioner and the secretary to approve it and pass the lands to patent; nor that, if the withdrawal be not an obstacle, it still is their duty to do so. But it is insisted that, so long as the selection was without the secretary's actual approval, it gave no right as against the government, and that the withdrawal, made while it was as yet unapproved, became a legal obstacle to its approval. In this there is an obvious misconception of the office and effect of the selection, and the misconception is particularly shown in the brief for the appellants, where the selection is treated as only a preliminary land application or filing. Counsel there say: ‘What is the effect, then, of the mere filing of an indemnity selection? Its effect, we submit, is to give the selector a preference right to the land as against one tendering a filing thereafter.’”

In discussing the power of the Secretary of the Interior and the purpose of the law, the Court said:

“Its purpose is to make sure that, in accord with that power of supervision and direction, he is to see to it that the right of selection is not abused, that claims arising out of prior settlement and the like are not disturbed, that no indemnity is given except for actual losses of the class intended, and that the lands selected are such as are subject to selection. But, of course, it does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress, as manifested in the granting act” (citing cases).

As to the interference with private rights, the Court said:

“Besides, to apply the act to the lands in question, lawfully earned and selected as they were, would work such an interference with private rights as plainly to require that it be construed as not including them” (citing cases, including the Lytle case).

In the case of *Payne v. New Mexico*, 255 W. S. 367, the State of New Mexico was authorized under its Enabling Act to make certain selections in lieu of any of the public lands passing under school land grant that might be included in a public reservation. The state made the selection and submitted it to the Secretary of the Interior. Subsequently the bound-

aries of the reservation involved were changed so as to exclude the original land from the reservation. The question then arose whether the state should be compelled to take the original land, or whether they had a vested right in the selected lieu lands which they could enforce. The Court held that the state had a vested right in the selected lieu lands. In discussing the case, the Court said:

“In the brief for the officers it is frankly and rightly conceded to be well settled that ‘a claimant to public land who has done all that is required under the law to perfect his claim acquires rights against the government, and that his right to a legal title is to be determined as of that time;’ and also that this rule ‘is based upon the theory that, by virtue of his compliance with the requirements, he has an equitable title to the land; that in equity it is his, and the government holds it in trust for him’ (citing *Lytle v. Arkansas*, *supra*, and other cases). But it is said that as the selection is ‘subject to the approval of the Secretary of the Interior,’ no right can become vested nor equitable title be acquired thereunder unless and until his approval is had; and therefore that the rule just stated is not applicable here. To this we cannot assent. The words relied upon are not peculiar to this land grant, but are found in many others. Their purpose is to cast upon the secretary the duty of ascertaining whether the selector is acting within the law, in respect of both the land relinquished and the land selected,

and of approving or rejecting the selection accordingly. The power conferred is 'judicial in its nature,' and not only involves the authority, but implies the duty, 'to determine the lawfulness of the selections as of the time when the exertion of the authority was invoked by the lawful filing of the list of selections.' "

So, in this case, where the finding of fact is that Price has done all that is required under the law for him to do to perfect his claim, he is the equitable owner of the lands and the Board of Commissioners would have no power to declare his land segregated in order to accomplish the non-sale of the lands when they were not known mineral lands and when his rights had attached long prior to the attempted segregation or the attempted leasing of the land for mineral purposes.

The same principle is announced in case of *Wyoming v. United States*, 255 W. S. 489.

Right to Complete Initiated Title.

Where the right has been initiated by grant, or by voluntary act the one receiving the grant or initiating the right is entitled to protect his possession and his enjoyment thereof and to prosecute his proceedings for the perfection of the legal title.

He has the right to defend against trespassing of third parties.

Atherton v. Fowler, 96 W. S. 513, 24 L. ed. 732.

Haws v. Victoria, etc. Co., 160 W. S. 303, 40 L. ed. 436.

Earhart v. Board, 113 W. S. 527, 28 L. ed. 1113.

New England Oil Co. v. Congdon, 92 Pac. 108.

Miller v. Crissman, 73 Pac. 1083.

Del Monte v. Last Chance, 171 U. S. 75, 43 L. ed. 72.

Also against subsequent legislation where his claim has been accepted under prior legislation.

Union Pac. v. Harris, 215 U. S. 386, 54 Law ed. 246.

Washington & Idaho Ry. Co. v. Osborne, 160 U. S. 103, 40 Law ed. 356.

Possession of property is, of course, notice to the world of the claims of the possessor.

The Legislation Made a Contract.

Prior to the time that the State accepted the grant tendered it by the Enabling Act, the Government had a right to do as they pleased with the lands involved.

Union Pac. v. Douglas, 31 Fed. 520.

Union Pac. Ry. Co. v. Karger, 169 Fed. 459.

Territory of Oklahoma v. C. O. & W. Ry. Co., 20 Okla. 663, 95 Pac. 420.

Minn v. Batchelder, 68 U. S. —, 17 L. ed. 551.

After the acceptance by the State of a grant given by the Enabling Act, and the passage of the Sales Act of 1909, it bore all the relations of a contract and the lessee Price was entitled to have the land sold and to perform whatever conditions subsequent may be necessary.

The Supreme Court of the United States has so said in case of *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363:

“The transaction, as set forth in the statute, has all the elements of a contract of sale. The statute is a formal standing offer by the state of these lands for sale, on the terms therein mentioned, and an invitation to all qualified citizens of the United States to become purchasers thereof by filing an application for some specific tract thereof with the board, and complying with the subsequent conditions of payment and reclamation. The application is a written acceptance of the offer of the state, in relation to the land described therein, and, on the filing of the same, the minds of the seller and the purchaser—the state and the applicant—came together on the proposition, and thenceforth there was an agreement between them for the sale and purchase of that parcel of land, binding on each of them until released there-

from by some substantial default of the other, not overlooked or excused.”

All legislation had tendered to, and guaranteed to these lessees that if they leased these lands they could take them on these terms and with these expectations. By taking and holding leases, they offered to do so. State legislation was an acceptance of these offers. Their minds met and the contract was forever closed. The later statutes and acts of the Commissioners to the extent they attempted derogation thereof were violatiive thereof, nugatory, and void.

“That legislation surely impaired the obligation of the contract owner (here lessee Price) had with the state, for its effect was to destroy valuable property right and privileges belonging to him. It was, therefore, violative of the Constitution of the United States, Article 1, paragraph 10. The statute * * * affords them (Magnolia Petroleum Co. and State) no security or immunity for the acts complained of; it cannot be said therefore that this is a suit against the state within the meaning of the Eleventh Amendment.”

Pennoyer v. McConnaughy, 140 U. S. 1,
35 L. ed 363 (at page 371).

As to the occupant lessee, he occupied the relation of contractor who had accepted proposition

of Congress, and whose proposition had been accepted by the State. He held a vested right; and is and was entitled the security of the Constitution of the United States and to undisturbed enjoyment of what he had so richly earned, as against this Magnolia trespass.

Lessee Title Is Ancient Fee Farm.

It is to be noted that under the legislation Price and his predecessors in title had the right to re-lease until statehood, provided he did not commit waste and paid his annual rentals; that by the statutes enacted immediately after statehood the right to re-lease was reaffirmed in the lessee subject to his default of rental payments or the commission of waste. In addition to this he had the preference right to buy under the Enabling Act, the State Constitution and Sales Act of 1909. This did not give to the government or the state a right of reversion. It gave to the state the right to re-entry upon the failure of Price to perform a condition subsequent. Neither the government, the state, or any one else could alienate the land without his consent.

By the lease statute of 1909, Section 2, the rental price of all lands is fixed at four per cent of its ap-

praised value and the Act provided that a reappraisement be made each fifth and tenth years, and the rent changed accordingly. By the legislation the annual rentals were fixed dependent on valuation only. This effectually under the law for re-leasing gave to the lessee the equitable fee simple title and gave to the state the right only to perpetually correct the annual rental of the land. Price held what was known under the old English common law as a fee farm. The state had the right to the fee farm rent. Fee farm is defined as:

“Land held of another in fee—that is, in perpetuity, by the tenant and his heirs at a yearly rent without fealty, homage or other service than such as are specially comprised in the feoffment.”

A very learned discussion of this title will be found in *DePeyster v. Michael*, 6 N. Y. (2 Selden) 467, 57 Am. Dec. 470. In the opinion it is said:

“The right of re-entry for nonpayment of rent, or the non-performance of other covenants, is not such an interest in the estate as makes the condition in question valid. It is not a reversion, nor is it the possibility of reversion, nor is it any estate in the land. It is a mere right or chose in action, and if enforced the grantor would be in, by the forfeiture of a condition, and not be a reverter. At common law, a right of entry, being a mere right of ac-

tion, could not be granted over. Quotes Littleton 214; 2 Cru., Tit. 18, C. 1, Sec. 15."

And further:

"When property is held on condition, all the attributes and incidents of absolute property belong to it until the condition be broken; and this is especially true, when, as in this case, the person entitled to the benefit of the condition is not in any degree affected in his right, under the condition, by the exercise and enjoyment of those attributes and incidents. The lessor's right of entry for breach of the lawful conditions is not defeated or impaired by the sale of the lessee's interest in the land."

The court further says in *DePeyster v. Michaels*, 57 Am. Dec. 470, at page 478:

"The lease on which this action is brought created an estate of inheritance in the grantee, his heirs and assigns. It is a fee-simple estate, subject only to the payment of the rents reserved, and to the performance of the lawful conditions contained therein. It is what was anciently called a fee-farm estate. A fee-farm rent is a rent charge issuing out of an estate in fee. A grant of lands in fee reserving rent is only letting lands to farm in fee simple instead of the usual methods for life or years; 2 Bla. Com. 43; Hargraves' Notes, 143 b, note 5. A fee-farm rent is a perpetual rent reserved on a conveyance in fee simple: 3 Cru. 284. Fee farms are lands held in fee to render for them annually the true value, or more or less, and is called a fee farm because a farm rent is reserved upon

a grant in fee: 2 Inst. 44. It is expressly said in the statute *QUIA EMPTORES* that it extends only to lands holden in fee simple; 1 Evans' Stat. 195, Sir Edward Coke declares that it extends to lands held in fee farm: 2 Inst. 502. These references are made for the purpose of showing that the estate creat'd by leases like the present are estates of inheritance; that they are classed among estates in fee simple: *THAT NO REVERSIONARY INTEREST REMAINS IN THE LESSOR*; and they are, therefore, subject to the operation of the legal principles which forbid restraints upon alienation, in all cases where no feudal relation exists between the grantor and grantee.

“Restraints upon alienation of lands held in fee simple were of feudal origin. A feoffment *IN FEE DID NOT ORIGINALLY PASS AN ESTATE IN THE SENSE IN WHICH WE NOW UNDERSTAND IT*. The purchaser took only an usufructuary interest, without the power of alienation in prejudice of the heir or of the lord. In default of heirs, the tenure became extinct and the land reverted to the lord. The heir took by purchase and independent of the ancestor, who could not alien, nor could the lord alien the seignory without the consent of the tenant. This restraint of alienation was a violent and unnatural state of things, contrary to the nature and value of property, and the inherent and universal love of independence. It arose partly from favor to the heir, and partly from favor to the lord, and the genius of the feudal system was originally so strong in favor of restraint upon alienation, that by a general ordinance mentioned in the book of Fiefs, the

hand of him who wrote a deed of alienation was directed to be struck off; 3 Kent's Com. 506. The same learned commentator proceeds to give an outline of the various causes which gradually led to the mitigation of these severe restrictions until they were finally removed (except as to the king's tenants *IN CAPITE*), by the statute of *QUIA EMPTORES TERRARUM*."

In this, note especially these expressions:

"A fee-farm is a rent charge issuing out of an estate in fee. A grant of lands in fee reserving rent is only letting lands to farm in fee simple instead of the usual methods for life or years: 2 Bla. Com. 43; Hargrave's Notes 143 b, note 5. A fee-farm rent is a perpetual rent reserved on a conveyance in fee simple; 3 Cru. 284."

Here the lessee took by Act of Congress on a perpetual rent subject only to payment thereof reserved, which right of payment could be offered for extinction for a gross sum; but always lessee held the preference right to be the lessee, and pre-right of pre-emption, that is, to be the purchaser of that right to collect; so his term, unless he sold out, was perpetual as against lessor, and passed to his heirs and was unrestricted as to alienation. *Noel v. Barrett* and *Clark v. Frazier, supra*. A fee-farm, it seems, and it was not subject to escheat or fealty under any law to be then, or now, considered a part of the statute contract.

State Supreme Court Opinion.

The opinion of the Supreme Court of Oklahoma appears record, pages 170 to 186, and is also found in, title *Magnolia Petroleum Company v. Price*, Vol. 86, Okla. Rep., page 105.

In the first paragraph the Supreme Court of the State construed the Act of Congress of March 3, 1891, 26 Stat. L. 1026, and held that this Act, nor any subsequent Act, gave a preference right to re-lease the public land of the Territory. Evidently the court overlooked the Act of May 4, 1894, 28 Stat. L., page 71, and the Secretary's Rules therein approved, in the writing of the first paragraph of the decision, although it is quoted in the body of the opinion. The Act of May 4, 1894, definitely says:

“And all of said lands and all of the school lands in said Territory may be leased under such laws and regulations as may be hereafter prescribed by the Legislature of said Territory, but until such legislative act the Governor, Secretary of the Territory and Superintendent of Public Instruction shall constitute a board for leasing of said lands, under the Rules and Regulations heretofore prescribed by the Secretary of the Interior. * * *”

The second paragraph of the syllabus holds that the only object of Congress was to preserve the

lands, or their proceeds, for the schools and public building purposes only, evidently overlooking the fact that Section 10 of the Enabling Act preserved to the lessee the preference right to buy.

Section 3 construed the rule adopted by the Secretary of the Interior under the Act of March 3, 1891, and held that it granted to the lessee only the right to lease in case the Territory chose to re-lease the lands.

The fourth paragraph holds that the legislation by the Enabling Act and the acceptance thereof by the Constitution constitutes a complete contract between the Government of the United States and the State of Oklahoma. In this we have agreed.

Sections 5, 6, 7, 8, and 9, construe the Enabling Act and holds that the State was not compelled to sell the lands and that Price could not compel the State to sell the lands. This was not our contention in the Supreme Court of the State and is not our contention here. Our contention is that the State has elected to sell the lands by the Act of March, 1909, Session Laws 1909, page 448. The Court seems to have confused the power of the Commissioners to determine whether or not the sale should be had and

the right of the Legislature of the State to so determine.

In the case at bar under the Sale Statutes the Legislature said sell the lands and uses the word shall, and to make it more positive they make it a penitentiary offense to fail to comply with the provisions of the Act. If the legislation is a contract as the State Court has held, then under the paragraphs just quoted the Commissioners have the power to repeal the statutes notwithstanding the mandatory order to the Commissioners to sell the lands, they can say, "We will not do so."

The 10th and 11th paragraphs hold that the lease to the Magnolia is valid and Price has no right to unreasonably interfere therewith. In the opinion the various sections of the Act of Congress are quoted as well as the provisions of the State Constitution. A mere reference is made to the Acts of 1907-1908, and 1909, 1910 and 1911 of the State Legislature regarding the leasing and sale of the land, but they are not quoted in the opinion. It is true that the Enabling Act uses the words "if sold," the preference should be given to the lessee, but nowhere in the Sale Act of 1909 is the expression "if

sold'' used. The mandatory order to the Commissioners is to sell the lands.

While the opinion of the Supreme Court does not state that the expression "if sold" should be read into the 1909 Sales Statute, yet the effect of the opinion is to write into the 1909 Sales Statute the provision *that if the Commissioners shall determine to sell the lands, the lessees shall have the preference right to buy.*

Section 1 of this Act says the Commissioners *shall* sell. While under the authorities previously quoted, we do not believe that the Legislature could delegate to the Commissioners the question as to whether or not they should sell the land. We do not have this question in this case. The Legislature has said sell. This Act of 1909 furnishes the *contract and compact between the lessee and the state.* In near the end of the opinion, record page 186, the court says:

"We have examined the various acts of Congress and all of the acts of Congress upon this question, including the Enabling Act, and have also examined and are reasonably familiar with the provisions of our State Constitution. We have also examined the various acts of the State Legislature with reference to the sale and leas-

ing of the public lands, and have examined the form, terms and conditions of the lease contract under which defendant in error, Price, claims, and are of the opinion that neither under the terms of his lease, the provisions of the statutes, the Constitution, nor the conditions of the Enabling Act, when applied to the facts in this case, is he entitled to the oil and gas therein, nor entitled to anything with reference to the oil and gas lease in question further than that prescribed by law, to wit: Any and all damages that he may sustain to his agricultural lease by reason of the operation of said oil and gas wells. If the drilling operations upon this land and the operation of the wells thereon have damaged him to any extent in the free exercise of his agricultural lease, he is entitled to such damages as he has sustained, but he is not entitled to the oil and gas nor the royalties from the wells, nor authorized to unduly interfere with the operations of same."

In this expression of the Court it will be noted that the Court included as binding the various provisions of the contract between the State and the lessee. They did not say that the contract complies with the law. The opinion cannot be read otherwise than to say that the Commisisoners were in the position to put any terms into the contract they desired and were not limited by any provisions of law.

A reading of the opinion will illustrate that the Court seemed to have construed the contract as if

between two private individuals, rather than the legislation enacted which involved grants and estates in the land. It is significant that in this long opinion not a single authority from any other court has been cited, this notwithstanding the fact that this case was thoroughly briefed before the Supreme Court of the State by counsel of respective sides, and thoroughly argued.

After this opinion was handed down the plaintiffs in error here filed their petition for a re-hearing, calling the Court's attention to the fact that that had overlooked many decisions (Record, page 187). This petition for re-hearing was overruled and this action was brought here by writ of error. It is apparent from this opinion that the State Court did construe the various Acts of Congress and did hold in effect that none of the constitutional provisions guaranteed to the plaintiffs in error by the Federal Constitution were violated. Plaintiffs in error contend that the court puts a wrong construction upon the various Acts of Congress; that the compact or contract between the Government and the State and Price was misconstrued; that the opinion violates the due process clause, impairment contract clause, and other clauses in the Federal Constitution.

Price claims the protection of the Federal Constitution and the Amendments thereto and the laws of the United States, because:

I.

(a) Congress reserved the lands by Act of March 3, 1891; 26 Stat. at L. 1043.

(b) The Act of May 4, 1894, 27 Stat. at L. 71, ratifies President's proclamation reserving section thirty-three (33).

(c) The Act of June 6, 1900, 31 Stat. at L. 680, reserves section thirty-three (33) in the Kiowa and Comanche reservation.

II.

The Secretary of Interior adopted Rules (record, pages 129 to 136) giving lessees preference right to release on March 20, 1891.

This preference right continued to be a property right.

Noel v. Barrett, 18 Okla. 304.

Clark v. Frazier (official volume not yet published), 177 Pac. 589.

III.

The preference right to buy was granted Price by Enabling Act, June 16, 1906, 34 Stat. at L. 267, Sec. 10, by Congress.

IV.

The State accepted the terms of the Enabling Act with its conditions, limitations, etc.,

By Sec. 8 of schedule of State Constitution ;

By Sec. 1 of Article II of State Constitution ;

By Sec. 4 of Article II of State Constitution.

The Acts of Congress and the sections of the Constitution of the State make the compact between the government and the state, and grants to Price the preference right to buy when sold.

V.

The State, acting through its Legislature, the only body authorized to act under the Enabling Act, did, on March 2, 1909, appearing Session Laws 1909, p. 448, directed and ordered the sale of section thirty-three (33), and made it a felony for any officer to wilfully violate the provisions of the Sales Statute and repealed all other statutes in conflict. This Act made a contract with Price which cannot be impaired.

VI.

Under these laws Price had :

1st. The preference right to re-lease.

2nd. After statehood the preference right to buy when sold.

3rd. After March 2, 1909, the absolute vested right to exercise the preference to buy and the Commissioners and their officials, not the State, have failed to sell.

4th. The right at all times to use and occupy the premises exclusively.

5th. These rights cannot be appropriated by a private concern for private purpose without Price's consent.

6th. They cannot be impaired.

7th. They cannot be taken away without due process of law.

The non-mineral character of the land was determined by the Board on March 25, 1909, by their approval (Record, pages 101-108) of the appraisal made on January 12, 1909 (Record, pages 98-100).

Price demanded that the lands be sold at a sale held in Stephens County, Oklahoma, in January, 1911 (Record, pages 101-102), and the agents refused.

He also demanded by letter of February 19, 1910 (Record, pages 148-149), that the land be sold with the rest.

The trial court found, paragraph 8 of the decree (Record, page 155), that Price has always been ready, willing, and able to comply with the law as to the purchase of the lands and that he demanded of the Commissioners the sale of said lands.

The trial court finds the lands were not mineral in character until after the commencement of this action (Record, page 155, paragraph 11 of the decree). Price has done all required of him by law. He has done all that he can. His preference right to buy the lands and all of it should be preserved. The Commissioners have failed to comply with the election of the state to sell said land. The judgment of the Supreme Court of the State of Oklahoma should be reversed and that of the trial court affirmed.

Respectfully submitted,

A. T. Boys,
Attorney for Plaintiffs in Error.